

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALD ALSTON, Individually and on behalf of all
others similarly situated, *Plaintiff*,
v.
Town of Brookline, *et al.*, *Defendants*.

Civil Action No. 1:15-cv-13987-GAO
LEAVE TO FILE EXCESS PAGES
GRANTED ON 1/12/16

DEFENDANT TOWN’S MEMORANDUM IN SUPPORT OF PARTIAL MOTION TO DISMISS

Defendants the Town of Brookline, the Town’s Board of Selectmen (“Board”), and the individual defendants in their official capacities¹ (collectively, the “Town”) respectfully submit this memorandum in support of their Partial Motion to Dismiss the Complaint and Jury Demand of Plaintiff Gerald Alston (“Complaint”) regarding Plaintiff’s race discrimination claim against the Town under 42 U.S.C. §§ 1981 and 1983, and his First Amendment retaliation claim against the Town under § 1983.

The gravamen of the allegations of the Complaint is as follows: Plaintiff is a Town firefighter who alleges that the Board of Selectmen, as the Town’s final policy-maker with regard to his Town employment and because of the Board’s own racial bias (Plaintiff is Black) and desire to punish him for First Amendment activity, “endorsed” a psychiatrist’s conditions for his return to work from a leave of absence arising from certain on-the-job “going postal” statements he made (the psychiatrist’s conditions are at Ex. 12), which statements were found to have violated the Town’s Workplace Safety Policy. Plaintiff does not agree to comply with the psychiatrist’s recommendations that he be receiving psychiatric treatment and that he engage the Town in an exploration of possible workplace accommodations in advance of his return to work, which the psychiatrist recommended to assist him with avoiding another on-the-job outburst. Nor does he agree, despite his

¹ A suit against an official in his/her official capacity is a suit against the government entity. *Rosaura Bldg. Corp. v. Municipality of Mayaguez*, 778 F.3d 55, 62 (1st Cir. 2015) (citing cases).

documented history of cocaine use while an active employee and his hospitalization for alleged workplace stress on the heels of one incident of such use, to permit the Town to test him for drug use for a period of time following his return to work. And so he remains on leave.

The vast remainder of Plaintiff's 55-page, 167-paragraph Complaint surveys the stain of race discrimination that he alleges is part of the Town's (and the Nation's) several hundred-year-long history, attempts to weave in unrelated allegations of race discrimination by other employees when the Board of Selectmen did not have jurisdiction over them or when the Complaint alleges no knowledge or role by it with regard to the alleged misconduct (under the rubric of accusations against the "Town"),² reiterates a 2010 slur by Plaintiff's supervisor that he had unsuccessfully litigated twice previously, once at the Massachusetts Commission Against Discrimination ("MCAD") and then in Superior Court)³, and which is long since time-barred, and cites various political and policy decisions by the Board, Town Meeting, and Town officials that are not actionable by Plaintiff because they state no constitutional misconduct against him personally. As the below makes clear, the Complaint appears to largely be a continuation of a policy campaign begun several years ago by Plaintiff's counsel Brooks Ames regarding the proper role of the Town's (then-denominated) human relations commission while he was a Town official on that body (member and Chair of its Diversity Subcommittee).

² If the Court allows these allegations to remain in this lawsuit, the evidence will show that some were clearly drawn from public MCAD and court complaints that the Town has already litigated and that were found to have been without merit. Plaintiff apparently asks this Court to indulge re-litigation of these unrelated individual employment discrimination claims as a claim of constitutional misconduct against Plaintiff personally.

³ The Complaint concedes that Plaintiff allowed the Superior Court action to slip away due to his non-compliance with discovery requirements. *See infra* and Complaint, ¶¶ 12, 107.

I. BACKGROUND

The following summarizes the pertinent allegations of the Complaint, documents on which the Complaint relies and which are therefore incorporated by reference into it, and certain public record documents.⁴

A. Town Organization

The Board of Selectmen is comprised of five (5) Selectmen, whom voters elect for staggered three-year terms. Art. 3.1.1, Town By-Laws.⁵ The Board's composition in the relevant time frame has consisted of the following:

- **2010:** Named defendant Nancy Daly (2005-present, ¶ 24), named defendant Betsy DeWitt (2006-2015, ¶ 20), named defendant Ken Goldstein (2009-2015, ¶ 22), named defendant Jesse Mermell (2010-2013, ¶ 21), and Richard Benka (2011-14, *see* Ex. 1 & n.4).
- **2014:** Named defendants DeWitt, Goldstein, and Daly, in addition to Neil Wishinsky (2013-present, ¶ 23) and Ben Franco (2013-present, Ex. 2 & n.4).⁶
- **2015:** Named defendants Daly and Wishinsky, Selectmen Franco (*see supra*), and Bernard Greene and Nancy Heller (Ex. 3 & n.4).

The Board of Selectmen is the appointing authority for Department Heads within its jurisdiction (which does *not* include the School, Library, and Town Clerk Departments) and for Division Heads within the Department of Public Works ("DPW"), including DPW's Parks Division. 1985 Mass. Acts ch. 270; 1981 Mass. Acts ch. 32, § 1; Art. 3.17, Town By-Laws (*see* n.5); *see also infra* in this section below. It is also the appointing authority for the Fire Department, 1973 Mass. Acts ch. 534, and the Police Department. G.L. c. 41, § 97 and Ex. 4 (certified Town Meeting vote accepting G.L. c. 41, § 97) & n.4.⁷

⁴ In connection with this motion to dismiss, the Court may consider documents outside of the four corners of the Complaint that are incorporated by reference in the complaint, matters of public record, and other matters susceptible to judicial notice. *Lydon v. Local 103, Int'l Brotherhood of Elec. Workers*, 770 F.3d 48, 53 (1st Cir. 2014) (quoting *Giragosian v. Ryan*, 547 F.3d 59, 65 (1st Cir. 2008), quoting, in turn, *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 20 (1st Cir. 2003)).

⁵ The Town's by-laws are available online at <http://brooklinema.gov/DocumentCenter/Home/View/353>.

⁶ This document also reflects that Attorney Ames ran unsuccessfully for the Board in 2014.

⁷ Under Art. 3.1.2.A (*see* n.5), the Selectmen bear the title of "Fire Commissioners," but "their responsibilities and authority are not enhanced, diminished or altered in any fashion from those that exist

The DPW Commissioner is otherwise the appointing authority for DPW. 1981 Mass. Acts ch. 32, § 1. The Town's Parks and Recreation Commission is otherwise the appointing authority for the Recreation Department. 1963 Mass. Acts ch. 13, §§ 3, 4; 1981 Mass. Acts ch. 32, § 1, Section 5. The School Superintendent is the appointing authority for school principals, and the principals are the appointing authorities for their schools. G.L. c. 71, § 59B. The School Superintendent is appointed by the School Committee, G.L. c. 71, § 37, which is comprised of nine (9) independently elected persons serving staggered three (3) year terms. Art. 3.2, Town By-Laws (*see n.5*).

Town Meeting is the legislative body for the Town. Art. 2.1, Town By-Laws (*see n.5*). The Town has an Advisory Committee established pursuant to Art. 2.2 of the Town By-Laws (*see n.5*) and G.L. c. 39, § 16. Advisory Committee members are appointed by the Town Meeting Moderator, Art. 2.2, who is independently elected by Town voters. G.L. c. 39, § 14. Named Defendant Stanley Spiegel is a Town Meeting Member and Advisory Committee Member. Complaint, ¶ 25.

B. Allegations Relating to Plaintiff

Plaintiff has been employed by the Town as a firefighter since 2002. Complaint, ¶ 17. Almost 6 years ago, in May 2010, while Plaintiff was on injury leave, his wife found a voice mail message on Plaintiff's cell phone from his supervisor, then-Lt. (now Captain) Paul Pender, containing a racial slur ("f*cking n***er"⁸). *Id.*, ¶¶ 77, 79, 80. On July 27, 2010, Plaintiff filed a written complaint with the Fire Chief, which precipitated an internal investigation and Lt. Pender's transfer out of Plaintiff's station. *Id.*, ¶¶ 84, 86, 89. Plaintiff requested that the Town not fire Lt. Pender. *Id.*, ¶ 84. The internal investigation was

under applicable Laws by virtue of bearing such titles, nor shall the Board be involved in the day-to-day administration, operations or management of the ... Fire Department[]."

⁸ The evidence will show that the Complaint's description of the slur (¶80) is different from a recording of it Plaintiff produced in the Superior Court case discovery and presented to the Town in connection with its original investigation.

allegedly intentionally “slow and long” to create “the impression that [Plaintiff’s] claims ... lacked merit,” although the Complaint concedes that within several weeks (“mid-August”) the Board knew of the misconduct and disciplined Lt. Pender with a two-shift suspension.

Id., ¶¶ 7, 88-89.⁹ Additional steps taken by the Town to address the slur included:

- ordering Pender to a mediation with Plaintiff, *id.*, ¶ 91;
- adopting a new “zero tolerance” anti-discrimination policy, *id.*, ¶ 90; and
- retaining the Massachusetts Commission Against Discrimination (“MCAD”) in 2010-2011 to train the Town’s workforce, *id.*, ¶¶ 8, 129 (fourth bullet point).

Later in 2010, Lt. Pender received the Medal of Valor from then-United States Attorney General Eric Holder at the White House. *Id.*, ¶¶ 6.¹⁰

In the period of time following the slur, Lt. Pender covered as acting captain on some occasions, but he was not permanently promoted to Captain until May 2013. *Id.*, ¶¶ 7, 92, 105.¹¹ Plaintiff raised various concerns in the slur’s aftermath, and the Town investigated them. *Id.*, ¶¶ 8, 35(d), 99, 102, 113, 115.¹²

In May 2012, Plaintiff filed a charge of discrimination with the MCAD that complained 1) about Lt. Pender’s slur two years earlier, 2) that his civil rights were violated because in 2010 Lt. Pender had been promoted (this Complaint now concedes that this was a temporary promotion to *Acting* Captain, not an appointment by the Board of Selectmen), and 3) that his civil rights were violated when the new Fire Chief enquired of Plaintiff how he would feel about being assigned to work with Lt. Pender at that point. *Id.*, ¶ 101 and Ex 5 &

⁹ The Complaint alleges that during the course of the investigation, HR Director DeBow asked Plaintiff how long he wanted Pender to suffer and called him an “a**hole”. *Id.*, ¶ 87. If these allegations remain in the case, they will be vigorously denied.

¹⁰ Selectman Mermell “tweeted” a congratulatory message regarding Lt. Pender’s achievement. *Id.*, ¶ 6.

¹¹ HR Director DeBow allegedly did nothing when Plaintiff complained to her about Pender’s 2010 acting captain promotion. *Id.*, ¶ 96.

¹² Plaintiff complains that HR Director DeBow’s investigatory reports depicted Plaintiff as being disruptive and overly-sensitive for the purpose of suggesting that he was imagining or fabricating his complaints. *Id.*, ¶ 99. The evidence will show that they do not. What they will show is that (aside from the 2010 slur investigation) Plaintiff repeatedly refused to participate in internal investigations by providing information that would have assisted the Town with determining the merit of his complaints.

n.4. On November 19, 2012, Plaintiff filed an Amended Charge of Discrimination with the MCAD conceding that the original Charge was time-barred or non-actionable and substituting new allegations stating that unnamed firefighters ostracized him, unnamed “chiefs” ordered the conduct, and he reported all of this to unnamed “chiefs” and unnamed Human Resources personnel, who did nothing. *Id.* and Ex 6 & n.4.

The Town investigated Plaintiff’s MCAD allegations, but could not substantiate Plaintiff’s allegations. *Id.*, ¶ 102.¹³ The investigation was allegedly a sham. *Id.* In April and May 2013, the Town did not temporarily promote Plaintiff to acting lieutenant even though he was the “senior man”, and it did not investigate his complaint about this. *Id.*, ¶ 106.¹⁴

Following Lt. Pender’s permanent promotion to Captain in May 2013, Plaintiff filed his MCAD allegations in Superior Court, *Id.*, ¶ 101 and Ex. 7 & n.4, as reported by the Boston Globe that fall. *Id.*, ¶ 107.¹⁵

In December 2013, Plaintiff found the word “leave” “on the door behind [Plaintiff’s] jacket.” *Id.*, ¶ 112. Plaintiff photographed the “leave” message and told other firefighters that “this is the kind of thing that makes people go postal.” *Id.* The Town began an investigation of Plaintiff’s “going postal” comment under the Town’s Workplace Safety Policy and had him submit to a psychiatric fitness-for-duty examination. *Id.*, ¶ 116.¹⁶ While

¹³ If these time-barred allegations are allowed to proceed, the evidence will show that Plaintiff refused to participate in this internal investigation.

¹⁴ The evidence will show that to the contrary, Plaintiff did not cooperate with the Town’s attempt to investigate it.

¹⁵ Following the Globe coverage, Selectmen Daly distributed at a Town committee meeting an unpublished version of a retired Black Town firefighter’s letter to the editor of a local newspaper stating the writer’s opinion that Plaintiff’s Superior Court complaint allegations were “ignorant, false and deceitful.” *Id.*, ¶ 109. Town Meeting and Advisory Committee member Stanley Spiegel distributed the published version of the letter to Town Meeting members, stating that he was providing it to them to supply them with another viewpoint. *Id.*, ¶¶ 25, 110. At some point (the Complaint does not say when), Selectman DeWitt misstated to Town Meeting members that the investigation into the slur had been conducted under the Town’s antidiscrimination policy, when that policy had not yet been adopted. *Id.*, ¶ 108.

¹⁶ The evidence will show that Plaintiff made statements on multiple dates in addition to the “going postal” statement conceded in the Complaint -- including statements specifically about “shootings” -- and did so while exhibiting agitation. Moreover, just prior to being placed on leave, he said he was concerned about his own ability to focus on his job.

it initially issued a stay away order to Plaintiff, the Town lifted that order in early January after the Town's psychiatrist opined that Plaintiff was not an immediate threat. *Id.*, ¶ 117-18. However, the Town's psychiatrist determined that Plaintiff was not fit for duty. *Id.*, ¶¶ 11, 120, 123. The Town also initiated an investigation into the "leave" incident under the anti-discrimination policy. *Id.*, ¶ 115.¹⁷

In connection with the Superior Court action, the Town received Plaintiff's medical records showing that he had tested positive for cocaine on a day when he had shown sufficient symptoms of stress at work to be hospitalized, and more cocaine use in the months prior to December 2011. *Id.*, ¶¶ 100, 122. It provided the records to the Town's psychiatrist for review in connection with his fitness-for-duty determinations. *Id.*, ¶ 123. The Town's psychiatrist examined Plaintiff again, and as before, determined that Plaintiff was psychiatrically not fit for duty. *Id.*, ¶¶ 11, 120, 123.

Upon Plaintiff's being found unfit for duty, the Town placed him on unpaid administrative leave during which time he was compensated through his sick leave and other leave banks. *Id.*, ¶¶ 11-12, 120, 126. The Complaint alleges that the Town's placement of Plaintiff on unpaid leave upon being determined unfit for duty, with resort to his leave banks, was done with the purpose of terminating him. *Id.*, ¶ 11.

In May 2014, the Town determined that Plaintiff had violated the Town's Workplace Safety Policy and it set conditions for his return to work, including two years of random drug-testing. *Id.*, ¶¶ 119, 125. The investigations were allegedly "shams" and the workplace safety policy investigation result was "false". *Id.*, ¶¶ 112-19.¹⁸

¹⁷ The evidence will show that Plaintiff did not participate in either investigation (under the Workplace Safety Policy and under the anti-discrimination policy), including declining to provide all photographs he indicated to the Fire Chief he had in his possession depicting the "leave" writing. *See also* n.18 *infra*.

¹⁸ The Complaint alleges that HR Director DeBow did not contact Alston until three (3) months after the incident. *Id.*, ¶ 115. During the investigation, HR Director DeBow had asked Plaintiff to supply her with all of his photographs of the "leave" writing, but he directed her to his attorney in the Superior Court

During the summer of 2014, the Superior Court entered final judgment against Plaintiff on that complaint due to his failure to comply with discovery. *Id.*, ¶¶ 12, 107; *see also* Ex. 9 & n.4. (In July 2015, the Superior Court denied Plaintiff’s Mass. R. Civ. P. 60(b) motion for relief from this final judgment, partly on the basis of the Town’s repeated need to file discovery motions and Plaintiff’s non-compliance with discovery. Ex. 10 & n.4 *supra*.¹⁹)

Plaintiff finally exhausted his leave banks in October 2014. *Id.*, ¶¶ 12, 120, 126. HR Director DeBow attempted to schedule a reasonable accommodation meeting with Plaintiff to discuss his work status. *Id.*, ¶ 127. On the pretense of being fearful that this was a set-up for termination,²⁰ Plaintiff’s counsel asked to speak with then-Board Chair Ken Goldstein. *Id.*, ¶ 128. Chairman Goldstein canceled his meeting with Plaintiff’s Counsel after a Town attorney emailed Attorney Ames, suggesting that his representation of Plaintiff could violate the State Ethics Law, as he had been a “municipal employee” – a member of the Town’s human relations commission and Chair of its Diversity Sub-Committee – when that body undertook to investigate Plaintiff’s Superior Court “ostracizing” allegations, and Attorney Ames was therefore potentially subject to the “forever ban” of G.L. c. 268A, § 18(a). *Id.*, ¶ 128; *see also* Ex. 11 & n.4. The email suggested to Attorney Ames that he seek an opinion directly from the State Ethics Commission regarding this question. Ex. 11 & n.4.

In late November and early December 2014, Plaintiff and others communicated to the Selectmen various matters, including a request for a racial climate review of the Fire Department, a request for an outside review of various matters, and a request for a hearing. *Id.*, ¶ 131. Plaintiff also asked to be put back on paid administrative leave. *Id.*, ¶¶ 120, 126,

lawsuit even though the investigation was outside of the scope of the lawsuit, and she informed him of this in a further attempt to obtain the photographs. *Id.*, ¶ 115, Ex. 8 & n.4; *see also* n.17 *supra*.

¹⁹ See the on-line docket at: http://www.masscourts.org/eservices/?x=DL01dRwOxmBbv-CHQ71kicVC0sWkQi09vHkzFrTdmgm542A*-eJUfHz8BLPocacUwIUEGHmTtRkhpT2hRjIOkw.

²⁰ The Complaint alleges that Plaintiff was concerned because the Town had called in another firefighter for a reasonable accommodation meeting and then pressured him into early retirement, but it does not disclose the race of this firefighter. *Id.*, ¶ 127.

131. The Selectmen retained a Latino board member of the Lawyers Committee for Civil Rights to conduct an outside review as Plaintiff had requested, which was limited to a review on the papers rather than a *de novo* review. *Id.*, ¶¶ 14, 129, 144. Plaintiff alleges that the outside review was a sham. *Id.*, ¶ 144.

The Complaint accuses “the Town” of having “leaked” the contents of Plaintiff’s personnel file to Mr. Spiegel but does not suggest who did this. *Id.*, ¶ 124.²¹

In January 2015, then-Chair Goldstein undertook to personally meet with Plaintiff and Attorney Ames (with Town Counsel Murphy present) to discuss Plaintiff’s concerns. *Id.*, ¶ 136. The Complaint contains a slew of accusations against Chairman Goldstein and Town Counsel Murphy arising from that meeting, including that Goldstein said that Mr. Spiegel was free to defame Plaintiff, that he (Chair Goldstein) accused Plaintiff of threatening his family because he is Black, and that during the meeting, Town Counsel Murphy made repeated and gratuitous references to the slur. *Id.*²²

Following a public protest in support of Plaintiff, Plaintiff demanded another fitness for duty examination with a different psychiatrist. *Id.*, ¶¶ 14, 139. The Town accommodated this additional request, and returned him to paid administrative leave after he participated in the evaluation in February 2015. *Id.*, ¶ 139. This new psychiatrist also concluded that

²¹ The evidence will show that there was no such “leak.” The Complaint also alleges that Plaintiff’s counsel complained to Town Counsel Murphy about Mr. Spiegel’s alleged statements to third parties regarding Mr. Alston, and she investigated it. *Id.*, ¶¶ 132-33. Her investigation was allegedly a “sham.” *Id.*, ¶ 133. When, following the Spiegel incident, Plaintiff and Attorney Ames wanted to view the original of Plaintiff’s personnel file, Town Counsel Murphy made arrangements for someone to be present during the original personnel file review, who was a police detective assigned to her office. *Id.*, ¶ 134. Attorney Ames contacted Chairman Goldstein complaining about the detective’s presence. *Id.* After speaking with Town Counsel Murphy, Chairman Goldstein called back Attorney Ames and told him that the detective would leave. *Id.*

²² The Town will vigorously deny these allegations. The Town brings to this Court’s attention that Attorney Ames is both a key witness and Plaintiff’s trial counsel, which could raise an issue down the road under Supreme Judicial Court Disciplinary Rule (“DR”) 3.7 (“Lawyer As Witness”). It will be essential to the Town’s defense to depose Attorney Ames regarding this meeting once discovery is underway. The Town raises this possible issue at this early juncture to enable the Court and the parties to consider it in orderly fashion.

Plaintiff could only return to work on certain conditions. *Id.* **First**, she said that Plaintiff should receive mental health treatment, including meeting with a therapist weekly and a psychiatrist monthly, for at least one month prior to returning to work (in order to establish a relationship with his treatment providers) and for at least 1 year following it, in order “to help him to be better able to handle stressors he is likely to encounter upon returning to work.”

Id., ¶ 139; *see also* Ex 12 at 47-48 & n.4. She further stated that Plaintiff should sign “appropriate releases” so that Plaintiff’s treatment providers “can report failure to comply with treatment and any concerns about safety to the Town’s HR Department or otherwise designated agent.” *Id.*, ¶ 139; *see also* Ex 12 at 48 & n.4. **Second**, she said that the Town should attempt to enlist Plaintiff in a discussion regarding reasonable accommodations (which the Town had attempted to do in November 2014, *see supra* and ¶ 127²³). Complaint, ¶ 139; Ex 12 at 48-49 & n.4. **Third**, Plaintiff should undergo at least two years of random toxic screens to assure that he remains drug free, given evidence that Plaintiff had used cocaine and marijuana, and because use of such drugs “would diminish his capacity to perform his essential job functions and would increase the risk of violent behavior.”

Complaint, ¶ 139; Ex. 12 at 49 & n.4.²⁴ The Complaint alleges that Plaintiff was determined to be fit by a psychiatrist that he independently retained, but does not state that he has ever supplied this psychiatrist’s evaluation to the Town for its consideration regarding his work status. *See id.*, ¶¶ 15, 141.²⁵

²³ The evidence will show that because Attorney Ames insisted that several members of the public be in attendance at Plaintiff’s November 2014 workplace accommodation meeting with the Fire Chief and HR Director in addition to him as Plaintiff’s counsel, this meeting did not go forward.

²⁴ Town Counsel Murphy and HR Director DeBow allegedly directed the second psychiatrist not to change Plaintiff’s return-to-work conditions. *Id.*, ¶ 15. The evidence will show this did not happen.

²⁵ The evidence will show that as of this date Plaintiff has not done so.

Plaintiff has not agreed to the psychiatrists' conditions for returning to work and now insists that the full Board of Selectmen meet with him. *Id.*, ¶¶ 136, 140.²⁶ This lawsuit seeks payment for damages, punitive damages and Attorney Ames's attorneys' fees related to Plaintiff's leave status under these circumstances. *Id.*, ¶ 142, "Relief Requested".

C. "Municipal Policy/Custom"

The Complaint alleges that in the 18th century, some private Town residents owned slaves and the Town named a school after one of them. *Id.*, ¶ 37. Various Town committee race- and diversity-related efforts beginning in the 1950's constituted cynical window dressing. *Id.*, ¶ 41. A study from half a century ago identified housing discrimination in the private real estate market. *Id.*, ¶ 38. The Town hired relatives of existing Town employees, who were White. *Id.*, ¶ 39. Various allegedly discriminatory decisions and actions were taken during the period 2005-2015 by various employees and departments not under the jurisdiction of the Board of Selectmen (*see* Section I(A). *Id.*, ¶¶ 43, 47, 51, 60 (DPW); *id.*, ¶¶ 45-46 (Recreation Department)²⁷; *id.*, ¶ 52 (Schools - hiring), ¶ 57 (Schools - student discipline)²⁸, ¶ 58 (Schools - teacher discipline).²⁹

Plaintiff's allegations regarding the Police Department (for which the Selectmen are the appointing authority) concern an allegedly discriminatory civil service by-pass decision

²⁶ If these allegations remain in the case, former Chair Goldstein and Town Counsel Murphy will vigorously deny Plaintiff's and Attorney Ames's rendition of this meeting. Plaintiff makes a demand for a meeting with the full Board in the face of this lawsuit seeking to establish municipal liability based on every step any Town official has taken – most of which is non-actionable – and when, the evidence will show, then-Chair Goldstein's good faith agreement to meet with Plaintiff and Attorney Ames at Ames's request ended with what the Town will maintain are false accusations against him and Attorney Ames's own ridiculing of him in the "re-Tweeting" of a cartoon depicting Attorney Ames's rendition of that meeting that he (Attorney Ames) posted on his personal "Twitter" account. *See* n.40 *infra*.

²⁷ The Recreation Department allegations allege involvement by HR Director DeBow and a Town Counsel prior to Town Counsel Murphy's appointment in 2013, ¶ 28, but no allegation of involvement by the Board.

²⁸ The paragraph alleges involvement by Town Counsel Murphy but no allegation of involvement by the Board.

²⁹ The paragraph alleges involvement by Town Counsel Murphy but no allegation of involvement by the Board. The Complaint also alleges a discriminatory promotional decision in an unidentified department, making it impossible to determine the appointing authority. *Id.*, ¶ 44. Nor does this paragraph explicitly refer to any involvement by the Board.

in 2008,³⁰ and an allegedly discriminatory altercation involving a White police officer and a Black town meeting member in 2008 that involved a prior Town Counsel and another unidentified white Town official. *See id.*, ¶¶ 28, 49. They include an allegation of light discipline of white officers in 2012 without identifying the decision-maker. *Id.*, ¶ 54.³¹

With regard to the Fire Department (also for which the Selectmen are the appointing authority), Plaintiff alleges that the **Board of Selectmen** disciplined a **White** firefighter with the stiffest of discipline, **termination** (discipline greater than a 5-day suspension is within the purview of the appointing authority, *see* n.31) and that a White firefighter was “protected” after several arrests by unidentified decision-makers. *Id.*, ¶ 59.

Plaintiff also alleges that in 2013, the Board of Selectmen hired a White candidate over a more-qualified Black candidate for Planning Director and did not sufficiently factor in a need for the successful candidate to have affordable housing experience, and appointed only Whites to the hiring committee for that position (without alleging this was despite the existence of more qualified Black candidates for the hiring committee). *Id.*, ¶ 55.

Plaintiff also alleges that in the same time period, the Board of Selectmen appointed a **Black** man as a **department head**, *id.*, ¶¶ 36(f), 146, and recruited a **Black man** to run for a vacant seat on the Board in a political campaign. *Id.*, ¶ 147.

The Complaint otherwise contains an allegation of individual discriminatory conduct on the basis of **sex** in connection with a 2011 investigation (both parties in the underlying incident were White) involving HR Director DeBow and a single Selectman (not the full Board), defendant Daly. *Id.*, ¶ 53.

³⁰ With regard to the 2008 allegedly discriminatory hiring decision, the Complaint alleges that in 2013, HR Director DeBow, Police Chief and Town Counsel Murphy discouraged the applicant from reviewing her file, and that Town Counsel Murphy misstated her ranking on the civil service examination, without alleging any involvement by the Board. *Id.*, ¶ 50. While Attorney Ames was a member of it and Chair of its Diversity Subcommittee, the human relations commission undertook her cause. *Id.*, ¶ 67; *Ex. 11* at 2.

³¹ The Civil Service law, G.L. c. 31, § 41, requires that discipline greater than five (5) days suspension be imposed by the appointing authority, but permits lesser discipline by subordinates.

D. Diversity-Related Policy and Legislative Actions and Debates, 2010-Present

The Complaint maintains that the following states constitutional misconduct against Plaintiff personally that warrants an award of damages, punitive damages and Attorney Ames's attorneys' fees: In 2010, Town Meeting passed a resolution calling for enhanced diversity measures by Town government. *Id.*, ¶ 62.³² The Selectmen tasked HR Director DeBow with reporting back regarding the Town's diversity practices rather than task a committee with examining this. *Id.*, ¶¶ 62-63. In 2011, Selectman DeWitt stated that a committee would be formed to look at the Town's diversity practices, but it was never filled and instead she, Selectman Mermell, and staff met about the matter. *Id.*, ¶ 64-65. Selectman DeWitt misspoke in stating to Town Meeting members and citizens that the Town had recently adopted an affirmative action policy. *Id.*, ¶¶ 64, 67. Beginning in 2012, the Town's Human Relations Commission (of which Attorney Ames was a member and Chair of its Diversity Subcommittee, *see id.*, ¶ 69 and Ex. 11 at 2) wanted to undertake responsibility for investigating Town-related employment discrimination complaints. *Id.*, ¶¶ 12, 66-67. After Plaintiff filed his Superior Court complaint in 2013, Attorney Ames's commission attempted to investigate the matters Plaintiff's court complaint raised, but the Board of Selectmen declined to release the internal investigation reports, Selectman DeWitt declined to attend a commission meeting to discuss a matter in litigation, and Selectman DeWitt authorized Town Counsel to prevent the Fire Chief from attending its meetings to discuss the work culture in the Fire Department. *Id.*, ¶¶ 12, 111. Also beginning in 2013, the efforts by Attorney Ames's commission to undertake an investigation role regarding workplace complaints were hampered by certain Board appointments of individuals who disagreed with that role, and by the Board's decision not to appoint others who supported it. *Id.*, ¶ 12, 69-72. Chairman

³² As the resolution wound its way through the legislative process, Selectman Daly allegedly commented that the petitioner should not expect Brookline "to look like Boston." *Id.*, ¶ 62.

Goldstein allegedly told one Black applicant for the commission that he did not support his application because the applicant had engaged in name-calling against a Black committee member (“house servant”). *Id.*, ¶¶ 72. The Town Moderator (who is an independently-elected official, *see* Section I(A) *supra*, and who is not named in this Complaint at all) instructed a Black applicant for Attorney Ames’s commission not to call Town officials racist on the floor of Town Meeting while Town Meeting was debating a resolution pertaining to the vacancies on the commission. *Id.*, ¶¶ 18, 73. The Selectmen created a new committee that proposed eliminating investigation of Town employment discrimination complaints from the commission’s duties, which **Town Meeting – the Town’s elected legislative body – approved** in 2014, with the Selectmen’s support. *Id.*, ¶¶ 18, 69, 74. In 2015, the Selectmen recruited a Black man to run for an open seat on the Board, and the Town’s voters elected him into office. *Id.*, ¶ 147. The Complaint attacks the Selectmen’s support of him on the basis that he had not stopped efforts to limit the role of the commission regarding Town employment discrimination complaints, *inter alia*. *Id.*, ¶ 147. It also attacks the Selectmen’s appointment of a Black diversity director (who is staff support to the same commission) who had frustrated that commission’s efforts in 2013 to assume this role, *inter alia*. *Id.*, ¶ 146.

The Complaint alleges that the Town has not completed a racial climate review of the Town’s workforce Plaintiff requested in late 2014 (which reflects Attorney Ames’s proposal to the commission in 2013, while he was a member). *Id.*, ¶¶ 14, 143; *see also* Ex. 11 at 2.

II. ARGUMENT

A. Legal Standards and Overview

1. Standard of Review for Motions to Dismiss

In *Rodriguez-Ramos v. Hernandez-Gregorat*, 685 F.3d 34, 39-40 (2012), the First Circuit articulated the current legal standard applicable to motions to dismiss:

“[W]e disregard statements in the complaint that merely offer “legal conclusion[s] couched as ... fact[]” or “threadbare recitals of the elements of a cause of action.” *Ocasio-Hernandez v. Fortuno-Burset*, 640 F.3d 1, 12 (1st Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 ... (2009)). The remaining, non-conclusory allegations are entitled to a presumption of truth, and we draw all reasonable inferences therefrom in the pleader’s favor. *See id.* “The make-or-break standard ... is that the combined allegations, taken as true, must state a plausible, not a merely conceivable, case for relief.” *Sepulvedo-Villarini v. Dep’t of Educ. of P.R.*, 628 F.3d 25, 29 (1st Cir. 2010). To survive a motion to dismiss, a complaint must, in other words, “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949.

2. Legal Standard Applicable to Plaintiff’s §§ 1981/1983 Discrimination and § 1983 First Amendment Retaliation Claims

With regard to Plaintiff’s § 1981 discrimination claim and § 1983 Equal Protection Clause (“EPC”) claims, he must show “1) that he was selected for adverse treatment compared with others similarly situated, and 2) that the selection for adverse treatment was based on his race.” *PowerComm, LLC v. Holyoke Gas & Elec. Dept.*, 657 F.3d 31, 35-36 (1st Cir. 2011) (racial animus required for § 1981 claims); *Rios-Colon v. Toledo-Davila*, 641 F.3d 1, 4 (1st Cir. 2011) (§ 1983); *Rivera v. Puerto Rico Aqueduct and Sewers Auth’y*, 331 F.3d 183, 191-92 (1st Cir. 2001) (§ 1983, intentional discrimination required as with Title VII); *Quarterman v. City of Springfield*, 716 F. Supp. 2d 67 (D. Mass. 2009) (invidious discrimination, §§ 1981 and 1983); *see also Hernandez v. New York*, 500 U.S. 352, 359-60 (1991) (only **intentional discrimination** violates EPC); *Washington v. Davis*, 426 U.S. 229, 239, 242 (**same**).

To make out a First Amendment retaliation claim, a plaintiff must show, *inter alia*, that the speech was a substantial or motivating factor in an **adverse employment action**. *O'Connor v. Stevens*, 994 F.2d 905, 912-13 (1st Cir. 1993). Under First Amendment jurisprudence, there is a cognizable adverse action only where the action “would place substantial pressure on even one of thick skin to conform.” *Rodriguez-Garcia v. Miranda Marin*, 610 F.3d 756, 766 (1st Cir. 2010) (citing *Agosto-de-Feliciano v. Aponte-Roque*, 889 F.2d 1209, 1218 (1st Cir. 1989)). Under either theory (EPC or First Amendment retaliation), the adverse action must result in a work situation that is “‘unreasonably inferior’ to the norms for the position.” *Ayala-Sepulveda v. Municipality of San German*, 671 F.3d 24, 31-32 (1st Cir. 2012) (citing *Rodriguez-Garcia v. Miranda Marin*, 610 F.3d 756, 766 (1st Cir. 2010)).

3. Municipal Liability Standard

A municipality may be liable under §§ 1981 and 1983 only where a municipal policy or custom is the “moving force” inflicting the injury, as there is no *respondeat superior* liability under either § 1981 or § 1983. *Connick v. Thompson*, 563 U.S. 51, 131 S. Ct. 1350, 1359 (2011); *Board of County Comm’rs of Bryan Cty. v. Brown*, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388 (1997); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386, 109 S. Ct. 1197, 1203 (1989) (citing cases); *Rosaura Bldg. Corp.*, 778 F.3d at 62; *Powell v. City of Pittsfield*, 143 F. Supp. 2d 94, 113-14 (D. Mass. 2001) (municipal policy or custom required for municipal § 1981 liability, citing *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735-36 (1989)). “Policy” refers to decisions of a “duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality,” *Brown*, 520 U.S. at 403, 117 S. Ct. at 1388, such as a “‘policy statement, ordinance, regulation or decision officially adopted and promulgated by’” an official in charge. *Suprenant v. Rivas*, 424 F.3d 5, 19 (1st Cir. 2005) (quoting *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018 (1978)); *see also Rodriguez-Garcia v. Miranda-Marin*, 610 F.3d 756, 769 (1st Cir.

2010); *Silva v. Worden*, 130 F.3d 26, 31 (1st Cir. 1997). If it is a decision that is challenged as policy, a plaintiff must show a “‘deliberate choice to follow a course of action made from among various alternatives by the official or **officials responsible for establishing final policy with respect to the subject matter in question.**’” *Walden v. City of Providence*, 596 F.3d 38, 55 (1st Cir. 2010) (emphasis added, quoting *Pembaur v. City of Cincinnati*, 475 U.S. 569, 106 S. Ct. 1292 (1986)); *see also Brown*, 520 U.S. at 405, 117 S. Ct. at 1389; *Silva*, 130 F.3d at 31 (officials must be ones with “*final authority* to establish municipal policy with respect to the action) (emphasis in original); *Rodriguez-Garcia*, 610 F.3d at 769. Here, as the Complaint concedes, the final policy-maker with regard to Plaintiff’s employment as a firefighter is the five-member Board of Selectmen. *See* Section I(A); *see also Rosaura Bldg. Corp.*, 778 F.3d 62 (mayors in Puerto Rico have ultimate authority over employment decisions); *Rodriguez-Garcia*, 610 F.3d at 770 (mayor was the final policy-maker regarding plaintiff’s employment, due to hiring/firing authority under Puerto Rico law).

A municipal “custom” exists where municipal “practices [are] so persistent and widespread as to practically have the force of law.” *Connick*, 563 U.S. at 60-61, 131 S. Ct. at 1359; *Brown*, 520 U.S. at 403, 117 S. Ct. at 1388. They “‘must be so well settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet did nothing to end the practice.’” *Walden*, 596 F.3d at 57-58 (recordings of telephone calls within police department was not so widespread or well-settled as to have force of law) (quoting *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 24 (1st Cir. 2006)); *see also Silva*, 130 F.3d at 31-32 (to establish municipal “custom,” there must be actual or constructive knowledge of it by final policy-makers); *Coyne v. City of Somerville*, 972 F.2d 440 (1st Cir. 1992) (granting motion to dismiss, as 4 or 5 alleged instances of hiring of “cronies” over 10 years does not establish a municipal “custom”); *Kinan v. City of Brockton*, 876 F.2d 1029, 1035 (1st Cir. 1989) (plaintiff must show

“acquiescence” by “policy-maker” to “custom ... as to which he has actual or constructive knowledge”; not shown where incident post-dated policy-maker’s tenure).

4. Overview/Preliminary Application of Legal Standards

Based on the foregoing, the Court should wholly ignore the allegations contained in Paragraphs 1, 16, 31-36, 40, 93, 98 and 145 as reciting threadbare legal conclusions, and turn to the remaining allegations to determine their sufficiency. *See* Section II(A)(1).

Next, the Court should determine whether the Complaint sufficiently alleges a municipal **policy** of **intentional** race discrimination or First Amendment retaliation based on either a written policy or decision-making by the Town’s final policy-maker with regard to Plaintiff’s employment, which is the Board of Selectmen. *See* Sections I(A), II(B)(1) and (B)(2). Plaintiff does not allege that the Town has a written policy providing for such unconstitutional conduct; therefore, Plaintiff may only rely on Board of Selectmen decision-making that was the “moving force” behind any constitutional injury he personally suffered. *See* Sections II(B)(2) and (B)(3).

To the extent Plaintiff relies on an unconstitutional Town **“custom,”** Plaintiff must allege that **this Board** of Selectmen **intentionally**, and **because of its own animus** based on race or First Amendment exercise, **acquiesced** to a **widespread, settled practice** of race discrimination or First Amendment retaliation of which it knew or had constructive knowledge (since this Board is not vicariously liable for any unlawful motives of others), and that such acquiescence was the moving force behind Plaintiff’s own constitutional injury. *Id.*

B. The Allegations Do Not Sufficiently State Invidious Discrimination or First Amendment Retaliation By This Board Causing Plaintiff Injury

In an unavailing attempt to embroider a depiction of a “municipal policy or custom” to serve as a vehicle for Plaintiff’s demand for damages, punitive damages, and Attorney Ames’s attorneys’ fees from the Town, the Complaint sweeps a host of action or inaction by

various departments and independently elected officials under the rubric of “The Town”, when under applicable law they are not under jurisdiction of the Board of Selectmen, the final policy-maker with regard to Plaintiff’s employment. The following can be dismissed out-of-hand as failing to state any “municipal policy or custom” by the Board that was the “moving force” behind Plaintiff’s own alleged constitutional injury:

- Claims arising from the conduct of Mr. Spiegel (who is under the jurisdiction of the Town Moderator, an independently elected official (*see* Section I(A)), such as those set forth in ¶¶ 73, 110, 132, 136.³³
- Claims relating to the School Department, which is under the jurisdiction of the School Committee, independently elected officials (*see* Section I(A)), such as those set forth in ¶¶ 36(f), 52 (referring, *inter alia*, to discriminatory hiring decision 23 years earlier), 57, 58.
- Claims arising from conduct and decision-making within the jurisdiction of DPW dating back as much as 10 years, including the DPW Parks Division (the DPW Commissioner is the appointing authority for DPW, *see* Section I(A)), such as those set forth in ¶¶ 43, 47, 51, 60, without allegation of knowledge or acquiescence by this Board of Selectmen.
- Claims dating back almost 10 years arising from conduct and decision-making relating to the Recreation Department, which is under the jurisdiction of the Parks and Recreation Commission (*see* Section I(A)), such as those set forth in ¶¶ 45-46, without allegation of knowledge or acquiescence by this Board of Selectmen.
- Assorted other claims related to race reaching back to the 18th century, such as those in ¶¶ 37-41.

Similarly, the Complaint alleges a host of conduct by individual Selectmen, Town Counsel, the HR Director and other Town officials and departments without any accompanying allegation of knowledge or acquiescence by this or any Board of Selectmen as a body. *See, e.g.*, ¶¶ 6 (former Selectman Mermell’s congratulatory “tweet” to Lt. Pender for receiving the Medal of Valor), 14 (Town Counsel), 15 (Town Counsel and the HR Director), 45, 47, 48, 50, 53, 57, 58, 62, 64, 65, 72, 73, 77, 79, 81-84, 87, 96, 99, 101, 108-10, 112, 113, 115, 127, 128, 132, 133-38, 144.

³³ Paragraph 136 alleges that former Chair Goldstein is individually liable because he indicated to Plaintiff at his January 2015 meeting with him and Attorney Ames that Mr. Spiegel was not under the jurisdiction of the Board.

Plaintiff's allegations pertaining to the period 2005-2015 (§§ 42-60) concern actions or decisions (much of which does not form any basis for colorable discrimination claims) by parties other than this Board (or any preceding Board, in many cases), and they do not reflect any suggestion of knowledge or acquiescence by this Board from which its own animus could be inferred for purposes of stating a claim of discriminatory and/or retaliatory municipal policy-making or custom. *See* § 48 (2007 incident of a police officer's alleged unlawful arrest of Black town meeting member; then-Board's role was to promote officer (which did not constitute adverse action against the Black town meeting member), and create an ad hoc committee to review incident); § 49 (2008 alleged discriminatory civil service bypass; no allegation that then-Board knew that hiring decision involved a bypass³⁴); § 50 (town officials discouraged the bypassed 2008 Black police candidate from reviewing her personnel file and provided incorrect information about her civil service examination score, which does not constitute colorable adverse action; in any event, no allegation that Board knew or should have known); § 53 (alleged sex discrimination in crediting male Advisory Committee member over female staff member in connection with sham investigation (which does not constitute colorable adverse action); no allegation of involvement by the Board as a body (Complaint alleges involvement by a single Selectman only)); § 54 (light discipline of police officers without any allegation of involvement by the Board, *see* n.31); § 55 (allegation that only White people were appointed to hiring committee without comparator candidate

³⁴ The Complaint reflects, and the evidence will show, that Attorney Ames, as a member of the human relations commission and Chair of its Diversity Subcommittee, personally petitioned Town officials in 2013 regarding the matters involving the 2008 by-passed police candidate. *See* Complaint, § 67; Ex. 11 at 2 & n.4; *see also* Ex. 14 (minutes reflecting Diversity Committee's hearing of the 2008 police candidate's complaint while Attorney Ames was Chair). This lends support to the merit of the Town's suggestion that he seek an opinion from the State Ethics Commission regarding his representation of Plaintiff (whose complaints the human relations commission had taken up while he was on it) against his former municipal employer in light of the Ethics Law's "forever ban" (the Complaint challenges the suggestion to seek further advice as "baseless and intended to intimidate", *see* § 128; Ex. 11 & n.4). Further below, the Town points out that the allegation that Plaintiff's own constitutional rights were violated by a Town lawyer's suggestion to Plaintiff's lawyer – a former Town official -- obtain an opinion from the relevant State enforcement agency does not state a claim.

information or any other suggestion of discriminatory decision-making); ¶ 56 (allegation of protection of White firefighter without any allegation of involvement by the Board).

To establish municipal liability based on a discriminatory or retaliatory “custom”, Plaintiff must allege that the Board of Selectmen deliberately chose – because of its own racial animus, or because of its own desire to punish Plaintiff for his First Amendment activity -- not to act in the face of actual or constructive knowledge that its own subordinates were engaging in a widespread, well-established pattern of constitutional misconduct. Plaintiff’s “custom” allegations regarding conduct under the Board’s jurisdiction described above are thin to say the least, and fall well short of the legal standard.³⁵ *See* Section II(C) *supra*; *Coyne*, 972 F.2d at 440 (4-5 incidents over 10 years was insufficient). Indeed, the Complaint alleges that in 2015, **this Board fired a White** firefighter for misconduct. *Id.*, ¶ 59. In 2014, **this Board hired a Black** candidate as diversity director, and in 2015, **this Board recruited a Black** candidate to run in an election for the Board of Selectmen. *Id.*, ¶¶ 146-47. Moreover, the Complaint doesn’t purport to allege any “custom” of First Amendment retaliation at all, but a sole accusation relating to School matters under the jurisdiction of the School Committee. *Id.*, ¶ 58.

Given the foregoing, Plaintiff may use § 1981 and § 1983 only as a vehicle to challenge conduct by the Board of Selectmen (the final decision-maker with regard to his employment) that pertains to him specifically, with the exception of claims that are non-colorable or precluded for the reasons set forth below.

³⁵ Plaintiff’s own Complaint illustrates the point beautifully, where he attempts to weave in allegations from hundreds of years ago involving long-dead parties in an attempt to establish municipal “custom” liability.

C. The Court Should Dismiss Claims That Do Not State Colorable Disparate Treatment or First Amendment Retaliation

In addition (and in the alternative), the Town points out that large swaths of the Complaint allege conduct that does not state actionable disparate treatment or First Amendment retaliation, as follows:

- The allegations summarized in Section I(D) relate to policy- and politics-related decisions by the Selectmen and various Town bodies and officials -- *e.g.*, a revamped Town by-law voted by Town Meeting removing investigation of job discrimination matters from the human relations commission's jurisdiction³⁶ -- that did not amount to adverse job action (an "unreasonably inferior" job situation, *see supra* Section II(B)), or to constitutional misconduct, by this Board against Plaintiff. *See, e.g.*, ¶¶ 12, 18, 61-75, 111, 145-147. As is evident from that section and Ex. 11, Attorney Ames, as a former member of the human relations commission and Chair of its Diversity Subcommittee, was a staunch advocate for active assumption by the human relations commission -- a citizen body -- of an investigatory role regarding sensitive workplace complaints (including, at the time Gerald Alston's Superior Court complaint allegations). He apparently seeks to use this lawsuit as a vehicle to challenge those policy decisions. Such efforts are unavailing. Attorney Ames is not entitled to recoup attorneys' fees from the public fisc under the rubric of fee-shifting statutes such as § 1981 and § 1983 for the purpose of challenging the policy choices of Town Meeting, the Board, and various Town officials.
- Paragraph 128 regards an email by a Town attorney bringing to Attorney Ames's attention a possible conflict of interest under the State Ethics Law, given Ames's prior special municipal employment as a member (and Diversity Subcommittee Chair) of the human relations commission at a time that this body took up the matters raised in Plaintiff's Superior Court complaint, and given Ames's subsequent representation of Plaintiff in this action raising the same matters, now in a role adversarial to his former special municipal employer. *See Ex. 11*; *see also Ex. 14* (minutes reflecting Diversity Committee's hearing of 2008 police candidate's complaint while he was Chair, also referenced as a basis for this action in the Complaint, *see* ¶¶ 49-50). Ames's claim for attorneys' fees based on a suggestion to seek an opinion from the applicable State enforcement agency regarding the Ethics Law's "forever ban" and his former special municipal employment is a misuse of § 1981 and § 1983.
- Apparently, every investigation the Town took regarding Plaintiff's various complaints over the past 6 years were "shams." *See, e.g.*, ¶¶ 14, 99, 102, 113, 115, 116, 118, 119, 133.³⁷ For purposes of this motion to dismiss, the Town does not challenge the "sham"-related allegations regarding the Workplace Safety Policy investigation (¶¶ 115, 116, 118, 119), which relate to Plaintiff's current leave status

³⁶ In Paragraph 75, the Complaint maintains that the "Board of Selectmen" "abolished" the commission, but elsewhere the Complaint concedes that it was Town Meeting that made the policy choices involving the commission. *See* ¶ 74 (passage of "article in Town Meeting").

³⁷ Again, the evidence will show that generally, Plaintiff did not cooperate with the Town's attempts to investigate his complaints.

based on the two psychiatrists' opinions and return-to-work conditions. Otherwise, these allegations do not allege that the "sham" investigations resulted in colorable "adverse job action" within the meaning of § 1981 and § 1983. These allegations, and Plaintiff's allegation that the Town did not investigate his complaint about not being made acting lieutenant (§ 106³⁸), do not state adverse job action or constitutional misconduct by this Board against Plaintiff.

- The allegations regarding the promotions of Lt. (now Captain) Pender, accommodating his travel to Washington to receive the Medal of Valor from the U.S. Attorney General, and lack of response to Plaintiff's expressed unhappiness about Lt. Pender's promotions did not amount to constitutional misconduct against Plaintiff and those allegations do not state a claim. *See, e.g.,* §§ 7, 9, 88, 89, 92, 96, 101, 105.
- The decisions regarding the consequences that would be meted out to Lt. Pender in 2010 following the slur, or not meted out to other Town officials about conduct alleged in the Complaint, does not state a claim for adverse job action or constitutional misconduct against Plaintiff. *See, e.g.,* §§ 6, 48, 58, 86, 88, 89, 91, 134.
- The Selectmen did not engage in adverse job action or constitutional misconduct against Plaintiff by omitting to reach out to him or to make public statements. *See, e.g.,* §§ 89, 116, 126.
- Maintaining confidentiality regarding the circumstances of Lt. Pender's discipline was not adverse job action against Plaintiff or constitutional misconduct against him. *See, e.g.,* §§ 6, 104.
- Not having completed a racial climate review for which Attorney Ames had first advocated as a member of the human relations commission (*see* Ex. 11 at 4), and not having undertaken to discuss the racial climate review with Plaintiff, does not state a colorable claim of adverse job action or constitutional misconduct against Plaintiff. *See, e.g.,* §§ 14, 129, 140, 143.
- Delays in scheduling or failures to schedule meetings or hearings with Plaintiff is not adverse job action or constitutional misconduct against him. *See, e.g.,* §§ 129, 133, 140.
- Hiring Black job applicants, appointing Black commission members, and recruiting Black citizens to run for elective office is not adverse job action or constitutional misconduct against Plaintiff. *See, e.g.,* §§ 145-47.
- Creating commissions over the past 60 years, writing reports, and retaining the expertise of outside experts to address issues of concern in the community is not adverse job action or unconstitutional misconduct against Plaintiff. *See, e.g.,* §§ 41, 48, 62, 65, 69, 144.
- Retaining the State's leading civil rights enforcement agency (the MCAD) to train the Town's workforce about legal prohibitions against discrimination and retaliation, §§ 8, 129 (fourth bullet point), did not violate Plaintiff's rights as a matter of law. Adopting a "zero tolerance" anti-discrimination policy is decidedly not constitutional misconduct. *See* § 90.

³⁸ The evidence will show that Plaintiff did not cooperate with the Town's attempt to investigate this complaint.

D. The Court Should Dismiss Plaintiff's Allegations To the Extent They Are Time-Barred and Precluded as Previously Litigated

The statute of limitations for § 1981 actions is four (4) years. *See Jones v. R.R. Donnelley & Sons, Co.*, 541 U.S. 369, 382, 124 S. Ct. 1836, 1845 (2004). The statute of limitations for § 1983 actions brought in Massachusetts (based on the State limitations period applicable to tort actions) is three (3) years. *Mangano v. Bellotti*, 187 Fed. Appx. 8 [2006 WL 1828005] (1st Cir. 2006); *Griggs v. Lexington Police Dept.*, 672 F. Supp. 36, 38 (D. Mass. 1987). Federal law governs the accrual date, which is when Plaintiff knew or should have known of the injury on which his action is based. *Ruiz-Sulsona v. University of Puerto Rico*, 334 F.3d 157, 159 (1st Cir. 2003) (citing *AMTRAK v. Morgan*, 536 U.S. 101, 114, 122 S. Ct. 2061 (2002)); *Muniz-Cabrero v. Ruiz*, 23 F.3d 607, 610 (1994).

Plaintiff filed this action on December 1, 2015. Plaintiff cannot maintain a cause of action for discrimination prior to December 1, 2011, or for First Amendment retaliation prior to December 1, 2012. This eliminates Plaintiff's allegations regarding the 2010 slur and its aftermath contained in Paragraphs 76-94 of the Complaint.³⁹ This is particularly so given that Plaintiff's prior knowledge of his alleged constitutional injuries allegedly incurred during this time-barred period is evidenced in his past filings with the MCAD and Superior Court, which raise many of the same matters he raises here. *Compare, e.g.*, Complaint, ¶ 8, 83 (retaliation for reporting the slur, ostracizing, including by Pender), ¶¶ 5, 79-80 (slur), ¶¶ 6-9, 88, 92, 96, 101, 105 (Pender promotions/Medal of Valor, Town inaction to Plaintiff's unhappiness with promotions), ¶ 8 (MCAD training that was mocked) *with* original May 2012 MCAD charge, Ex. 5 & n.4 (slur, Pender promotion to acting captain) *and* November 2012 Amended MCAD charge (Ex. 6 & n.4, slur, promotion, retaliatory ostracizing, including by Pender) and June 2013 Superior Court complaint, Ex. 7 & n.4 (same).

³⁹ The last of these paragraphs, ¶ 94, regards a social media posting by a union official in 2010. *See Ex. 13.*

The Town maintains that Plaintiff's claims are precluded as previously litigated through final judgment for the reasons explained by defendants DeWitt, Goldstein, Daly, Mermell, Wishinsky, DeBow and Murphy in the brief accompanying their motion to dismiss, which arguments the Town incorporates by reference herein.

Conclusion

As the foregoing makes clear, this is an unusual case that is being pursued by a former Town official who is now serving as Plaintiff's counsel on these matters. The Complaint largely seeks to revive long-standing policy debates within the Town through the vehicle of 42 U.S.C. §§ 1981 and 1983, fee-shifting statutes, relating to conduct that is simply not actionable under those statutes. The bulk of Plaintiff's Complaint extends well beyond the presentation of colorable claims for redress by this Court, and appears to be filed in tandem with a long-standing media campaign that has been waged against the Town and its officials, including a stream of accusations against them, for example, on Facebook and "Twitter" accounts, despite the Town's good faith efforts to return the Plaintiff to work.⁴⁰

For the foregoing legal reasons, the Town asks the Court not to countenance this misuse of this forum and to excise those portions of the Complaint that do not state a claim against the Town of Brookline.

At the case proceeds, the evidence will show that the Town's efforts to return Plaintiff to work have been repeatedly impeded by his attorney's refusal to engage with

⁴⁰ See, e.g., https://twitter.com/BrooksAmes1?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor, his twitter account. This has included Attorney Ames's re-"Tweeting" a cartoon mocking former Chair Goldstein, who, at the time, was the Town's highest official, depicting him fleeing his January 2015 meeting with Plaintiff assertedly because he is Black, see ¶¶ 136-38, a version the Town vigorously disputes and regarding which Attorney Ames is a central witness. See Ex. 14.

the appropriate Town staff to effect Plaintiff's return to work.⁴¹ The Town is hopeful that the parties to this lawsuit can begin to work constructively to address the colorable portion of this Complaint regarding Plaintiff's work status in light of the psychiatrists' return-to-work conditions, address any outstanding concerns, and get Plaintiff back to work as a firefighter. This is particularly desirable given the amount of time (almost one year) that Plaintiff has been absent and on paid leave. *See Id.*, ¶ 14 (resumption of paid leave as of February 2015).

The Town is confident that its board-certified psychiatrists' conditions for Plaintiff's return-to-work at issue in that portion of the Complaint stating colorable claims are legally justified under all of the above-described circumstances, particularly given that Plaintiff has never supplied the Town with any information contradicting those recommendations. Still, and again, the Town invites Plaintiff to work with the Town regarding his return to work.

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CERTIFICATE OF SERVICE

I, Patricia Correa, hereby certify that on 1/12/16, I served the foregoing document on all parties by: filing it electronically with the ECF system for electronic receipt by all registered participants, and by email and mail to all non-registered participants.

/s/ Patricia Correa
Patricia Correa

⁴¹ These circumstances too may mean that Attorney Ames is a witness in this action. *See* n.22 and DR 3.7.

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 1

(2011 Annual Town Election Results)

Official Results		2011 ANNUAL TOWN ELECTION - BROOKLINE, MA MAY 3, 2011															
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	TOTAL
SELECTMEN - For Three Years																	
Vote for NOT more than Two																	
Blanks	123	86	62	142	43	95	55	43	46	41	66	58	75	89	56	78	1158
Write-in votes	0	0	0	4	5	0	0	0	3	3	1	0	4	1	0	3	24
RICHARD (DICK) BENKA	150	103	91	115	109	191	109	87	90	69	93	136	193	171	98	159	1964
NANCY A. DALY	169	108	122	136	108	204	116	91	106	79	97	160	148	152	92	128	2016
ANDREW A. GHOBRIAL	62	31	27	27	29	30	38	19	19	16	23	22	28	37	22	38	468
TOTAL	504	328	302	424	294	520	318	240	264	208	280	376	448	450	268	406	5630

TRUSTEES OF THE PUBLIC LIBRARY		TOTAL															
Three Years - Vote for NOT More than Four																	
Blanks	423	249	826	330	188	439	228	145	208	128	195	310	364	372	217	388	5010
Write-in votes	1	0	0	0	1	0	0	1	1	0	2	1	1	0	0	2	10
GARY D. JONES	141	102	89	138	92	146	107	82	84	70	91	110	126	125	77	102	1682
KAREN LIVINGSTON	142	92	92	104	100	144	93	78	68	68	83	111	145	136	81	106	1643
JONATHAN J. MARGOLIS	155	109	99	132	101	149	109	92	88	78	94	111	131	132	78	109	1767
MARY T. SULLIVAN	146	104	102	144	106	162	99	82	79	72	95	109	129	135	83	105	1752
TOTAL	1008	656	1208	848	588	1040	636	480	528	416	560	752	896	900	536	812	11864

SCHOOL COMMITTEE - For Three Years		TOTAL															
Vote for NOT More than Three																	
Blanks	289	191	162	236	136	298	159	108	137	93	142	225	272	285	157	288	3178
Write-in votes	0	0	0	1	4	0	0	1	1	0	1	1	0	0	0	1	10
ALAN R. MORSE	167	97	86	114	106	157	103	81	77	72	84	105	146	133	85	105	1718
REBECCA E. STONE	157	107	103	144	101	163	113	89	95	74	98	117	127	132	79	108	1807
AMY A. KERSHAW	143	97	102	141	94	162	102	81	86	73	95	116	127	125	81	107	1732
TOTAL	756	492	453	636	441	780	477	360	396	312	420	564	672	675	402	609	8445

HOUSING AUTHORITY - For Five Years		TOTAL															
Vote for NOT More than One																	
Blanks	104	53	53	65	50	105	39	35	29	30	40	78	89	97	53	98	1018
Write-in votes	0	0	0	2	2	0	0	0	0	0	1	1	1	0	0	0	7
MICHAEL JACOBS	148	111	98	145	95	155	120	85	103	74	99	109	134	128	81	105	1790
TOTAL	252	164	151	212	147	260	159	120	132	104	140	188	224	225	134	203	2815

Statistics		1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	Total
Voter Turnout	A TRUE COPY	252	164	151	212	147	260	159	120	132	104	140	188	224	225	134	203	2815
Total Registered Voters	ATTES.	2163	1681	2264	2051	2119	2192	2224	2176	2231	2274	2306	2354	2287	2541	2695	2301	35859
Percent Turnout		12%	10%	7%	10%	7%	12%	7%	6%	6%	5%	6%	8%	10%	9%	5%	9%	7.850%

Robert J. Ward
Town Clerk

Brookline
ANNUAL TOWN ELECTION, MAY 3, 2011

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 2

(2014 Annual Town Election Results)

Official Results			2014 ANNUAL TOWN ELECTION - BROOKLINE, MA MAY 6, 2014														
	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	TOTAL
SELECTMEN - For Three Years																	
Vote for NOT more than TWO																	
Blanks	77	25	84	111	104	129	44	45	38	77	31	36	24	45	49	44	963
Write-in votes	0	0	1	3	1	0	2	0	0	0	1	0	0	0	1	0	9
NANCY A. DALY	174	105	206	158	273	294	127	160	178	160	137	249	168	160	140	259	2948
BROOKS A. AMES	30	16	47	35	109	84	40	50	35	63	33	60	54	58	54	25	793
ARTHUR WELLINGTON CONQUEST III	26	17	51	46	86	160	38	61	32	62	40	70	57	46	40	24	856
BENJAMIN J. FRANCO	197	103	201	183	299	327	121	178	183	140	146	213	167	147	140	234	2979
TOTAL	504	266	590	536	872	994	372	494	466	502	388	628	470	456	424	586	8548

TRUSTEES OF THE PUBLIC LIBRARY																	TOTAL
Three Years - Vote for NOT More than FOUR																	
Blanks	463	192	522	454	890	864	316	415	410	385	300	540	426	415	491	582	7665
Write-in votes	0	0	2	1	1	2	0	0	0	1	0	1	0	0	1	0	9
GARY D. JONES	130	86	188	172	208	275	110	142	132	146	113	171	119	118	84	142	2336
KAREN LIVINGSTON	135	86	148	127	211	279	101	134	122	163	113	177	137	130	94	153	2310
JONATHAN J. MARGOLIS	143	86	166	166	223	297	112	158	139	167	126	191	134	121	91	154	2474
MAGDALENE MORAN	137	82	154	152	211	271	105	139	129	142	124	176	124	128	87	141	2302
TOTAL	1008	532	1180	1072	1744	1988	744	988	932	1004	776	1256	940	912	848	1172	17096

SCHOOL COMMITTEE - For Three Years																	TOTAL														
Vote for NOT More than THREE																															
Blanks	325	154	375	327	641	624	219	299	298	298	211	400	336	299	355	417	5578														
Write-in votes	1	1	3	1	3	0	0	1	2	0	3	3	5	4	2	0	29														
REBECCA E. STONE	154	82	185	164	217	292	124	155	144	163	123	188	125	130	105	165	2516														
MICHAEL A. GLOVER	132	81	154	154	221	270	102	139	124	138	114	169	114	121	83	145	2261														
LISA R. JACKSON	144	81	168	158	226	305	113	147	131	154	131	182	125	130	91	152	2438														
TOTAL	756	399	885	804	1308	1491	558	741	699	753	582	942	705	684	636	879	12822														

HOUSING AUTHORITY - For Five Years																	TOTAL
Vote for NOT More than ONE																	
Blanks	106	47	111	85	210	208	65	106	96	96	74	132	105	96	111	135	1783
Write-in votes	0	0	2	1	2	1	0	1	0	0	0	0	0	0	0	0	7
JOANNE M. SULLIVAN	146	86	182	182	224	288	121	140	137	155	120	182	130	132	101	158	2484
TOTAL	252	133	295	268	436	497	186	247	233	251	194	314	235	228	212	293	4274

Statistics TRUE COPY																	Total														
Voter Turnout	252	133	295	268	436	497	186	247	233	251	194	314	235	228	212	293	4274														
Total Registered Voters	2337	1834	2437	2377	2649	2481	2413	2362	2450	2564	2617	2869	2477	2509	2531	2100	39007														
Percent Turnout	11%	7%	12%	11%	16%	20%	8%	10%	10%	10%	7%	11%	9%	9%	8%	14%	10.957%														

Edward J. Ward
Town Clerk
Brookline

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 3

(2015 Annual Town Election Results)

2015 ANNUAL TOWN ELECTION - BROOKLINE, MA MAY 5, 2015																
Official Results	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Moderator - For Three Years																
Vote for NOT more than ONE																
Blanks	209	125	230	185	261	308	206	263	219	173	210	306	288	274	258	299
Write-in votes	2	1	4	2	2	0	0	1	1	0	5	2	7	2	0	3
EDWARD N. GADSBY, JR.	343	240	406	349	569	565	362	439	403	315	413	507	429	411	397	489
TOTAL	554	366	640	536	822	873	568	703	623	488	628	815	724	687	655	791
TOWN CLERK - For Three Years																
Vote for NOT more than ONE																
Blanks	197	118	210	154	247	288	182	245	205	165	192	273	267	262	227	280
Write-in votes	2	0	2	2	1	0	1	2	0	0	6	2	3	0	1	4
PATRICK J. WARD	355	248	428	380	574	585	385	456	418	323	430	540	454	425	427	507
TOTAL	554	366	640	536	822	873	568	703	623	488	628	815	724	687	655	791
SELECTMEN - For Three Years																
Vote for NOT more than Two																
Blanks	292	168	291	262	405	373	288	318	239	215	283	363	384	389	456	437
Write-in votes	2	1	0	6	0	0	1	2	0	0	5	3	5	3	1	8
BERNARD W. GREENE	244	187	342	255	366	393	306	364	354	260	303	390	284	281	195	355
NANCY S. HELLER	288	215	353	280	408	498	300	477	403	253	304	441	327	268	221	380
PAMELA C. LODISH	195	86	149	114	235	194	122	123	124	142	206	276	316	306	313	266
M. K. MERELICE	72	53	93	123	193	249	83	91	96	70	113	104	88	75	78	96
LAURENCE M. ONIE	35	22	52	32	37	39	36	29	30	36	42	53	44	52	46	40
TOTAL	1108	732	1280	1072	1644	1746	1136	1406	1246	976	1256	1630	1448	1374	1510	1562
TRUSTEES OF THE PUBLIC LIBRARY - For Three Years																
Vote for NOT More than Four																
Blanks	1101	675	1222	1061	1602	1585	1064	1364	1155	905	1107	1636	1494	1431	1427	1596
Write-in votes	1	2	4	3	1	0	0	3	0	0	4	1	3	4	0	3
CAROL AXELROD	301	204	351	303	449	494	320	374	359	277	338	458	367	356	310	407
VIVIAN E. GOLDMAN	269	200	329	288	403	472	300	358	332	262	344	384	333	324	295	407
REGINA HEALY	276	194	331	262	417	472	300	358	324	263	349	391	337	321	303	386
CAROL TROYEN LOHE	268	189	323	247	416	469	288	355	322	245	350	390	362	312	285	365
TOTAL	2216	1464	2560	2144	3288	3492	2272	2812	2492	1852	2512	3260	2896	2748	2620	3164
SCHOOL COMMITTEE - For Three Years																
Vote for NOT More than Three																
Blanks	662	385	687	687	1043	1024	675	743	590	513	626	873	905	896	964	968
Write-in votes	3	1	0	5	1	0	1	1	0	0	4	2	6	0	1	4
PEN-HAU BEN CHANG	294	207	350	287	388	449	293	392	362	276	337	451	339	317	244	393
BARBARA C. SCOTTO	279	226	366	271	442	463	298	437	378	288	397	440	348	315	277	407
SANDRA L. STOTSKY	166	88	175	137	225	272	167	132	159	154	192	263	279	258	274	254
ELIZABETH JACKSON STRAM	268	191	342	241	367	411	270	404	380	233	328	396	295	275	205	347
TOTAL	1662	1098	1920	1608	2466	2619	1704	2109	1869	1464	1884	2445	2172	2061	1965	2373
HOUSING AUTHORITY - For Five Years																
Vote for NOT More than One																
Blanks	265	157	283	215	340	373	233	334	270	204	261	376	345	339	307	367
Write-in votes	1	1	1	2	0	0	1	1	0	1	2	2	2	0	0	2
BARBARA DUGAN	288	208	356	319	482	500	334	368	353	283	365	437	377	348	348	422
TOTAL	554	366	640	536	822	873	568	703	623	488	628	815	724	687	655	791
QUESTION #1:																
OPERATING BUDGET OVERRIDE																
Blanks	15	8	13	8	26	16	19	3	17	6	10	15	7	8	6	13
YES	319	246	382	335	525	631	324	492	423	301	405	493	381	365	262	441
NO	220	112	245	193	271	226	225	208	183	181	213	307	336	314	387	337
TOTAL	554	366	640	536	822	873	568	703	623	488	628	815	724	687	655	791
QUESTION #2:																
DEBT EXCLUSION OVERRIDE																
Blanks	21	9	17	18	44	23	36	12	15	8	15	30	17	23	28	23
YES	436	307	517	411	639	727	424	597	517	391	486	639	544	504	449	597
NO	97	50	106	107	139	123	108	94	91	89	127	146	163	160	178	171
TOTAL	554	366	640	536	822	873	568	703	623	488	628	815	724	687	655	791
Statistics																
Voter Turnout	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Total Registered Voters	554	366	640	536	822	873	568	703	623	488	628	815	724	687	655	791
Percent Turnout	27%	22%	29%	26%	34%	39%	27%	33%	29%	22%	27%	32%	29%	27%	40%	29.822%

ANNUAL TOWN ELECTION, MAY 5TH, 2015

A TRUE COPY
ATTESTTown Clerk
Brookline

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 4

(Town Meeting Acceptance of G.L. c. 41, § 97)

notes shall be dated January 1, 1921, and shall be made payable in such annual proportionate payments as will extinguish the same in five years from their date. Such bonds or notes shall not be obligatory unless there is endorsed thereon an authenticating certificate of a trust company or of a national bank to be designated by the Selectmen.

The vote was taken by count. Tellers were appointed by the Moderator and were sworn by the Town Clerk.

The Tellers reported the whole number voting as one hundred and thirty-eight (138), as follows:—

Yes, one hundred and thirty-three (133).

No, five (5) and the Moderator declared the vote to authorize the Treasurer to borrow twenty-five thousand dollars (\$25,000) to purchase motor equipment for garbage disposal passed by more than two-thirds of the town-meeting members present and voting thereon.

Thirteenth Article, — To authorize the Board of Health to make a contract for a term of years for the disposal of garbage.

On motion of Philip S. Parker:

Voted, To authorize the Board of Health to make a contract for a term of years for the disposal of garbage.

Fourteenth Article, — To see if the town will vote to accept Section 97 of Chapter 41 of the General Laws, relating to the Police Department.

SECTION 97, CHAPTER 41

"In towns which accept this section or have accepted corresponding sections of earlier laws there shall be a police department established under the direction of the Selectmen, who shall appoint a chief of police and such other police officers as they deem necessary, and fix their compensation in an amount not exceeding the annual appropriation therefor. The Selectmen may make suitable regulations governing the police department and the officers thereof, and in towns which are not subject to provisions of chapter thirty-one to the contrary may remove the chief and other officers at pleasure. The chief of police shall be in immediate control of town property used by the department, and of the police officers, who shall obey his orders."

ATTEST:
A TRUE COPY

Town Clerk

Richard J. Ward

On motion of Philip S. Parker:

Voted, To accept Section 97, Chapter 41 of the General Laws, relating to the Police Department.

Fifteenth Article, — To see if the town will vote to accept Sections 21 to 28, inclusive, of Chapter 136 of the General Laws, relating to sports and games on the Lord's Day.

On motion of John H. Sherburne:

Voted, To accept Sections 21 to 28, inclusive, of Chapter 136 of the General Laws, relating to sports and games on the Lord's Day.

Sections 21 to 28 inclusive of Chapter 136, of the General Laws, are as follows:

Certain Sports and Games Permitted on the Lord's Day

Section 21. In any city or town which accepts sections twenty-one to twenty-eight, inclusive, in the manner provided in section twenty-six, or has accepted corresponding provisions of earlier laws in the manner provided therein, it shall be lawful to take part in or witness any athletic outdoor sport or game, in which the contestants do not receive and have not been promised any pecuniary reward, remuneration or consideration whatsoever directly or indirectly in connection therewith, on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.

Section 22. Such sports or games shall take place on such playgrounds, parks, or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park within one thousand feet of any regular place of worship.

Section 23. Such sports or games shall be conducted subject to such regulations and restrictions as shall be prescribed by the city council or selectmen, and the same shall be stated in the license or permit.

Section 24. No admission fee shall be charged directly or indirectly, and no business or other enterprise shall be conducted, and no collection shall be made at any such sport or game.

Section 25. The licensing authorities described in section twenty-two may at any time and without previous notice revoke permits to conduct the said sports or games if they have reason to believe that any provision of sections twenty-one to twenty-eight, inclusive, or of any regulation or restriction prescribed under section twenty-three, is being or will be violated.

Section 26. In a city, the question of accepting sections twenty-one to twenty-eight, inclusive, shall be submitted at a city election, but only

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 5

(May 2012 MCAD Charge)

**The Commonwealth of Massachusetts
Commission Against Discrimination
One Ashburton Place, Boston, MA 02108
Phone: (617) 994-6000 Fax: (617) 994-6024**

MCAD DOCKET NUMBER: 12BEM01278
FILING DATE: 05/24/12

EEOC/HUD CHARGE NUMBER: 16C-2012-01640
VIOLATION DATE: 05/17/12

Name of Aggrieved Person or Organization:

Gerald Alston
P.O. Box 240446
Boston, MA 02124
Primary Phone: (617)669-8996 ext. _____

Named is the employer, labor organization, employment agency, or state/local government agency who discriminated against me:

The Town of Brookline: Fire Department
Attn: Director Human Resources
300 Washington Street
Boston, MA 02120

Primary Phone: (617)730-2200 ext. _____

No. of Employees: 25+
Work Location:

Cause of Discrimination based on:

Race, Color, Black (Non-Hispanic).

The particulars are:

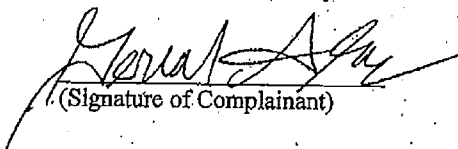
I, Gerald Alston, the Complainant believe that I was discriminated against by The Town of Brookline: Fire Department, on the basis of Race, Color. This is in violation of M.G.L. 151B Section 4 Paragraph I and Title VII.

In October 2010 I was racially discriminated against by Lt. Paul Pender my supervisor at Station 5 Firehouse in Brookline, MA. I was out of work for leave of absence as the result of an injury I sustained on the job. I had heard from my coworkers that Lt. Paul Pender was making comments to them stating that he believed that I was faking my injury to receive sick time for the summer. Following hearing reports of these remarks I received a phone call from Lt. Paul Pender he left me a voicemail calling me a "Fucking Nigger" on my cell phone.

I reported this incident to the town of Brookline and they assured me that the situation would be handled internally. I believed in good conscious that they would do so and they did not do so. I submitted a statement in writing requesting that they handle the situation and the town of Brookline responded to me. They responded to me stating that they would discipline Lt. Paul Pender accordingly by suspending him and not promote him. Then upon his return from suspension Lt Paul Pender was promoted to Captain.

On May 17, 2012 I was called into meet with Chief Paul Ford and he asked me, "If I still was going to have problems with the Paul Pender if we are ever to be assigned to work together?". I feel as though the town of Brookline is treating me as though I am the culprit of the negative activity. As the result of my race the Town of Brookline has not handled the situation in the way they would have had it been an employee of a different race. I feel as though as a result of this situation supervisors and coworkers are treating me.

I hereby verify, under the pains and penalties of perjury, that I have read this complaint and the allegations contained herein are true to the best of my knowledge.


(Signature of Complainant)

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 6

(November 2012 Amended MCAD Charge)

**Commonwealth of Massachusetts
Commission Against Discrimination**

Gerald Alston *
*
Complainant *
v. *
*
Town of Brookline *
*
Respondent *

MCAD Docket No. 12BEM01728
EEOC/HUD Charge No. 16C-2012-01640

Amended Complaint and Charge of Discrimination from the Complainant**Introduction**

Pursuant to 804 CMR 1.10(6) the Complainant amends his complaint and charge of discrimination. The original complaint, filed per se, failed to include a count of retaliation and failed to include allegation(s) of discriminatory conduct that occurred within three hundred days of filing. This Complaint cures those defects. By way of background, Mr. Alston engaged in a protected activity when he complained that a white superior officer called him a nigger in 2010, a message which was recorded on his voice mail. Mr. Alston engaged in additional forms of protected activity when he complained that the same officer was promoted to a higher position shortly after the incident. As a result, Mr. Alston has been shunned, isolated, and mocked by his fellow firefighters at the direction and instruction of his superiors for three years with significantly worsening conditions. As recently as May, 2012 he spent forty-eight hours on duty in which his fellow fire fighters ignored him when he said hello, refused to shake his hand, refused to invite him to meals, and refused to utter a single word to him. In addition to humiliation and isolation the mistreatment caused him serious concern for his safety. IN May, 2012 after being injured on duty, the Fire Department denied his request for injured on duty

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benefits. Upon information and belief, similarly situated employees who are not in a protected class and who have not engaged in a protected activity under M.G.L. c. 151B were granted benefits without delay.

Parties

1. Complainant Gerald Alston is an individual employed as a firefighter by the Town of Brookline, Massachusetts.
2. Mr. Alston is of African-America descent and is black.
3. Respondent Town of Brookline is a public employer with more than six full-time employees as contemplated by M.G.L. c. 151B and, upon information and belief, did employ more than fifteen full-time employees for twenty or more weeks per year in 2010, 2011, and 2012.

Facts

4. On or about Sunday, May 30th 2010 Mr. Alston received a phone message from a white superior officer, Lt. Pender. The voice mail purported to be a get well message due to the fact that Mr. Alston was injured. At the end of the voicemail, Lt. Pender can very clearly be heard saying "fucking nigger."
5. Mr. Alston complained about the incident in writing on or about June 26, 2010 and played the tape for his superiors and human resources, who promised to conduct a thorough investigation and act accordingly.
6. The investigation concluded that Lt. Pender did state "fucking nigger" on the voicemail message, but that Lt. Pender was not calling Mr. Alston a "fucking nigger." Instead, according to the investigation, Lt. Pender was calling another driver on the road a

"fucking nigger" and it was simply an unfortunate coincidence that he did so while on the phone with an African-American subordinate firefighter.

7. In any event, Lt. Pender was found to have violated the code of conduct and was suspended without pay for a few days. He was promoted shortly after returning from his suspension.
8. The town also promised to mandate training for officers and firefighters.
9. On or around January 1, 2011 Mr. Alston complained again that Lt. Pender should not be promoted after the incident, that Lt. Pender was ignoring him and refused to talk with him or treat him with respect, and that no training had been performed as promised.
10. When the training finally occurred, it was referred to throughout the department as "the Alston trainings" and the "Gerald trainings" in reference to the Complaint made by Mr. Alston.
11. Mr. Alston also became aware that in November, December, and January various chiefs in the department had instructed other firefighters to "stay away from Alston." They were instructed not to speak with him or interact with him otherwise they could be "sued" or "fired." At least one firefighter has come forth and exposed this practice in writing.
12. Throughout 2011 Alston met with his chiefs and human resources on multiple occasions to address the hostility and isolation he was experiencing. In each case he was told "we'll take care of it."
13. The conduct continued into the winter and spring of 2012. On three separate occasions he spent more than forty-eight hours surrounded by fellow firefighters in which they refused to utter a single word to him. He ate meals alone. They left the room when he

entered it. They refused to shake his hand, ignored his greetings, and did ostracized him from every social and work related event.

14. Mr. Alston was not only frustrated, humiliated, and ashamed but also feared for his safety. Firefighters are often forced into life-threatening situations in which their survival depends on the trust, support, cooperation, and commitment of their fellow firefighters. How could he count on men and women who refused to eat with him to save his life?

15. Despite repeated complaints to his chiefs and human resources on a monthly, if not weekly basis through the entire year of 2011 and until May, 2012 there was no intervention on his behalf, no investigation, no remedial action, and no assistance to Mr. Alston.

16. Finally, in May, 2012 he was injured on duty and unable to work. Mr. Alston has observed his white co-workers, and co-workers who had not engaged in protected activities, receive injured on duty benefits immediately and without resistance.

17. However, Mr. Alston received swift and severe resistance regarding his benefits. He was outright denied, forced to engage in a length application and appeal process, and forced to use his own personal sick time and vacation time in order to support his family in contravention of his collective bargaining agreement.

18. As a result of nearly three years of discriminatory and retaliatory harassment Mr. Alston has suffered from severe anxiety, depression, rage, humiliation, loss of self-esteem and severe emotional distress. His problems at work have contributed substantially to the break-down of his marriage and the correlation isolation from his daughter as a result thereof. In short, complaining about being called a nigger by a white superior officer has

(4)

resulted in the Department, down to nearly every last officer, joining together to destroy his life.

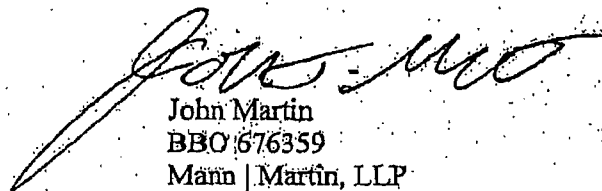
Claims

19. Based on the facts alleged herein the Complainant amends his complaint to include Discrimination based on race and color, and retaliation

Damages

20. The Complainant demands compensation for emotional distress, restitution for benefits for which he was unlawfully deprived, an injunction prohibiting further discrimination, MCAD mandated and supervised training for the department, and swift/appropriate discipline for the firefighters, officers, and chiefs who have engaged in blatant and unlawful discrimination.

Respectfully submitted by counsel,



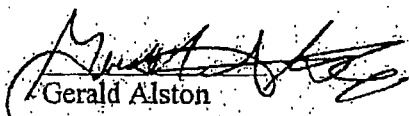
John Martin
BBO 676359
Mann | Martin, LLP
1071 Worcester Road, Suite 42
Framingham, MA 01701
508-270-0500
508-270-0515

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Sworn Affirmation of Truth

I, Gerald Alston, hereby depose and state under pains and penalties of perjury that I have reviewed the Amended Complaint prepared by counsel on my behalf. Upon information and belief, all facts included therein are true, accurate, and based on my personal observation and knowledge.

Signed this 16th day of ^{November} January, 2012


Gerald Alston

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Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 7

(June 2013 Norfolk Superior Court Complaint)

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT

Norfolk, ss.

NORFOLK SUPERIOR COURT
Docket No. NOCV2013-00898-B

Gerald Alston,
Plaintiff

v.

Town of Brookline
Defendant

COMPLAINT

INTRODUCTION

While the Plaintiff, an African-American male named Gerald Alston, was employed by the Defendant, the Town of Brookline, he was discriminated against by a white superior officer who called him a “fucking nigger” in a voice mail left on Mr. Alston’s phone in 2010. Mr. Alston then engaged in a protected activity when he complained about what that white superior officer had done. Mr. Alston engaged in additional forms of protected activity when he complained that the same officer was promoted to a higher position shortly after the incident. In retaliation for Mr. Alston having engaged in a protected activity Mr. Alston’s superiors instructed his fellow firefighters to “stay away from Alston” or else they may be “sued” or “fired”.

As a result of these instructions Mr. Alston has been shunned, isolated, and mocked by his fellow firefighters. As recently as May, 2012 Mr. Alston spent a forty-eight hour period on duty in which his fellow firefighters ignored him when he said hello, refused to shake his hand,

and refused to so much as utter a single word to him. In addition to this humiliation and isolation the mistreatment at the hands of his coworkers has caused him serious concern for his safety as firefighting is an inherently dangerous occupation that requires coworkers to look out for one another's safety. In May of 2012 after being injured on duty the Defendant denied Mr. Alston's request for "injured on duty" benefits. Upon information and belief, similarly situated employees who are not in a protected class and who have not engaged in a protected activity under M.G.L. c. 151B were granted benefits without delay.

PARTIES

1. Gerald Alston is an individual employed as a firefighter by the Town of Brookline, Massachusetts.
2. Mr. Alston is of African-American descent.
3. The Town of Brookline is a public employer with more than six full-time employees as contemplated by M.G.L. c. 151B and, upon information and belief, did employ more than fifteen full-time employees for twenty or more weeks per year in 2010, 2011, and 2012.

FACTS

4. On or about Sunday, May 30th 2010 Mr. Alston received a phone message from a white superior officer, Lt. Pender. The voice mail purported to be a get well message due to the fact that Mr. Alston was injured. At the end of the voicemail, Lt. Pender can very clearly be heard saying "fucking nigger."

5. Mr. Alston complained about the incident in writing on or about June 26, 2010 and played the tape for his superiors and human resources, who promised to conduct a thorough investigation and act accordingly.
6. The investigation concluded that Lt. Pender did state “fucking nigger” on the voicemail message, but that Lt. Pender was not calling Mr. Alston a “fucking nigger.” Instead, according to the investigation, Lt. Pender was calling another driver on the road a “fucking nigger” and it was simply an unfortunate coincidence that he did so while on the phone with an African-American subordinate firefighter.
7. In any event, Lt. Pender was found to have violated the code of conduct and was suspended without pay for a few days. He was promoted shortly after returning from his suspension.
8. The town also promised to mandate discrimination training for officers and firefighters.
9. On or around January 1, 2011 Mr. Alston complained again that Lt. Pender should not be promoted after the incident, that Lt. Pender was ignoring him and refused to talk with him or treat him with respect, and that no discrimination training had been performed as promised.
10. When the training finally occurred, it was referred to throughout the department as the “Alston trainings” and the “Gerald trainings” in reference to the complaint made by Mr. Alston.
11. Mr. Alston also became aware that in November, December, and January various chiefs in the department had instructed other firefighters to “stay away from Alston.” They were instructed not to speak with him or interact with him otherwise they could be “sued” or “fired.” At least one firefighter has come forth and exposed this practice in writing.

12. Throughout 2011 Alston met with his chiefs and human resources on multiple occasions to address the hostility and isolation he was experiencing. In each case he was told "we'll take care of it."
13. The conduct continued into the winter and spring of 2012. On three separate occasions he spent more than forty-eight hours surrounded by fellow firefighters in which they refused to utter a single word to him. He ate meals alone. They left the room when he entered it. They refused to shake his hand, ignored his greetings, and ostracized him from every social and work related event.
14. Mr. Alston was not only frustrated, humiliated, and ashamed but also feared for his safety. Firefighters are often forced into life-threatening situations in which their survival depends on the trust, support, cooperation, and commitment of their fellow firefighters.
15. Mr. Alston felt he could not count on the men and women who refused to eat with him to save his life should he find himself in a life threatening situation.
16. Despite repeated complaints to his chiefs and human resources on a monthly, if not weekly basis through the entire year of 2011 and until May, 2012 there was no intervention on his behalf, no investigation, no remedial action, and no assistance to Mr. Alston.
17. Finally, in May, 2012 he was injured on duty and unable to work. Mr. Alston has observed his white co-workers, and co-workers who had not engaged in protected activities, receive injured on duty benefits immediately and without resistance.
18. However, Mr. Alston received swift and severe resistance regarding his benefits. He was outright denied, forced to engage in a lengthy application and appeal process, and forced

to use his own personal sick time and vacation time in order to support his family in contravention of his collective bargaining agreement.

19. As a result of nearly three years of discriminatory and retaliatory harassment Mr. Alston has suffered from severe anxiety, depression, rage, humiliation, loss of self-esteem and severe emotional distress. His problems at work have contributed substantially to the break-down of his marriage and the correlating isolation from his daughter as a result thereof. In short, complaining about being called a “fucking nigger” by a white superior has resulted in the Department, down to nearly every last officer, joining together to make life as miserable as possible for Mr. Alston.

CLAIMS

Count I

Discrimination in violation of M.G.L. c. 151B §4(1)

20. The Plaintiff restates all prior paragraphs as if stated fully herein.
21. Mr. Alston is a member of a protected class under M.G.L. c. 151B.
22. Mr. Alston engaged in a protected activity under M.G.L. c. 151B.
23. During his employment with the Defendant, the application process that Mr. Alston was forced to go through in order to claim his “injured on duty” benefits was much more obstructive, complex, frustrating, and adversarial than was the application process for his similarly situated white coworkers who had not engaged in a protected activity, and he was ultimately denied those benefits whereas his similarly situated white coworkers were not.

24. During his employment with the Defendant, Mr. Alston's coworkers were specifically told by department chiefs to "stay away from Alston." These same coworkers were not given an instruction by a superior to "stay away from" any of Mr. Alston' similarly situated white coworkers.
25. Mr. Alston was subjected to these unequal, unacceptable working conditions and practices because of his race in violation of M.G.L. c. 151B and as a result suffered and continues to suffer damages.

Count II
Retaliation in violation of M.G.L. c. 151B §4(4)

26. The Plaintiff restates all prior paragraphs as if stated fully herein.
27. Mr. Alston engaged in a protected activity as defined by M.G.L. c. 151B when he filed a complaint against Lt. Pender, his superior, for calling Mr. Alston a "fucking nigger" while leaving a voice message on Mr. Alston's phone.
28. Mr. Alston engaged in additional forms of protected activity when he complained that Lt. Pender was promoted to a higher position shortly after the incident.
29. In retaliation for Mr. Alston engaging in that protected activity, his superiors orchestrated a department wide effort to shun, ostracize, and humiliate Mr. Alston by telling Mr. Alston's coworkers to "stay away from Alston" and not to speak with him or interact with him otherwise they could "sued" or "fired."
30. In retaliation for Mr. Alston engaging in protected activity the Defendant forced Mr. Alston to go through an application process for his "injured on duty" benefits that was much more adversarial and obstructive than was normal. Mr. Alston was ultimately

denied those benefits whereas similarly situated white coworkers who had not engaged in a protected activity were all granted their "injured on duty" benefits.

31. As a result thereof Mr. Alston suffered and continues to suffer injury.

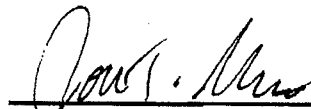
PRAYER FOR RELIEF

1. The plaintiff requests that this honorable Court enter judgment in Mr. Alston's favor and award:

- a. Damages for emotional distress;
- b. Punitive damages
- c. Attorney's fees and costs;
- d. Restitution for benefits for which he which he was unlawfully deprived;
- e. An injunction prohibiting further discrimination; and
- f. Any other damages this Court deems to be just and fair.

The plaintiff demands a trial by jury in all issues so triable.

Respectfully submitted by counsel,



John Martin
BEO 676359
Mann | Martin, LLP
1071 Worcester Road, Suite 42
Framingham, MA 01701
john@sbmannlaw.com
508-270-0500
508-270-0515

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 8

(April 2014 Letter from HR Director to Plaintiff
Requesting Photos of "Leave" Writing In Connection
with Workplace Safety Policy Investigation)



TOWN of BROOKLINE

Massachusetts

HUMAN RESOURCES OFFICE
333 Washington Street
Brookline, MA 02445
(617) 730-2120
www.BrooklineMA.gov

Sandra A. DeBow-Huang, Director
Human Resources Office

April 4, 2014

Firefighter Gerald Alston
61 Wayland Street
Dorchester MA 02125

Re: Investigations, various, 2nd opportunity

Firefighter Alston:

This letter is to follow-up on the January 13, 2014 letter, the March 28, 2014 telephone message and April 4th telephone conversation we had on Friday wherein I explained that I was trying to conduct two investigations (under the *Policy Against Discrimination, Sexual Harassment and Retaliation* and the Town's Workplace Safety Policy). In the March 28th message and April 4th conversation, I was specifically inquiring as to whether you had multiple pictures of the word "leave" and, if so, whether I could get copies to send them to the handwriting expert. The photo I sent to the handwriting expert has a glare on the letters. You indicated that you had three photos and that I should contact your attorney John Martin would forward the pictures to me. I will be finalizing the investigation once I receive the handwriting expert's report.

I also indicated in my telephone message and in our conversation that I would like to interview you as part of the two investigations (under the Anti-Discrimination and the Workplace Safety Policy). You instructed me to reach out to your attorney who would set up a meeting in which you could be interviewed, with him in attendance.

There seems to be some confusion regarding the scope of this investigation as your attorney instructed me to go through the Town's attorney for this request. This is not a part of the discrimination claim that is being litigated in superior court. Rather, this is a part of the Town's investigation of the December 19th incident where the word "leave" was written in the dirt/salt on the side of the ladder truck, as described in the earlier January 13, 2014 letter. Therefore, this is not a part of the case that your attorney and the Town's attorney are working on.

You can contact me directly (617) 730-2121 or contact me through Fire Chief Paul Ford or Chief of Operations Robert Ward. I do not anticipate the investigatory meeting would take more than one hour. Perhaps you can provide a copy of the pictures when we meet. I would really like to conclude these investigations by the end of next week.

Sincerely,


Sandra DeBow, Director
Human Resources Office

Cc: Fire Chief Paul Ford
Attorney John T. Martin

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 9

(July 2014 Norfolk Superior Court Final Judgment)

70.0

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT

CIVIL ACTION

NO. 13-898

GERALD ALSTON, Plaintiff(s)

vs.

TOWN OF BROOKLINE, Defendant(s)

FINAL JUDGMENT

THE complaint of the Plaintiff Gerald Alston
is dismissed as to Defendant Town of Brookline

Dated at Dedham, Massachusetts, this 8th day of
July ~~18~~ 2014.

Wacey J. Delaney
Assistant Clerk

A TRUE COPY

Attest: Cynthia A. Kramer
Deputy Assistant Clerk

7/8/14

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 10

(July 2015 Norfolk Superior Court Decision Denying
Plaintiff Relief from Final Judgment)

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

**SUPERIOR COURT
CIVIL ACTION NO. NOCV2013-0898**

**GERALD ALSTON,
Plaintiff**

v.

**TOWN OF BROOKLINE,
Defendant**

RECEIVED & FILED
CLERK OF THE COURTS
NORFOLK COUNTY
7/10/15

RULING ON PLAINTIFF'S MOTION FOR RELIEF FROM JUDGEMENT

Final judgement entered on this lawsuit on July 8, 2014 as a result of the plaintiff's failure to comply with the court's order concerning an overdue discovery response. Nearly a year later, the plaintiff has brought a motion which seeks relief from judgement under Mass. R. Civ. P. 60(b) citing "excusable neglect" as grounds.

In support of his motion, plaintiff has filed an affidavit from his prior counsel. That five sentence affidavit asserts that counsel had moved his office in June of 2013, a year prior to the entry of judgement. The defendant has filed its opposition.

The near one year delay is not explained by the affidavit filed on plaintiff's behalf, nor by the contents of the plaintiff's motion.¹ Further, the history of this case is replete with multiple instances of the defendant's having to file repeated motions seeking the court's assistance to compel the plaintiff to provide discovery. See Papers 5.0, 7.0, 9.0, 9.5, and 14.0.

The conduct at issue here is reflective not of "mistake, inadvertence or excusable neglect"


¹ That document merely outlines activity taking place since the July 2014 entry of judgement of dismissal concerning efforts at out of court mediation of the parties' dispute, with no reason posited for plaintiff's failure to have sought to vacate that judgement during those many months.

as referenced in Rule 60(b), but rather of egregious inattention of counsel or client. See *McIsaac v. Cedergren*, 54 Mass. App. Ct. 607, 609-610 (2002), citing *Tibbits v. Wizniewski*, 27 Mass. App. Ct. 729, 732 (1989).

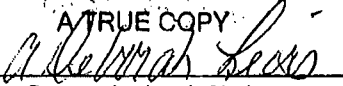
Order

The plaintiff's motion for relief from judgement is **Denied**.

Date: July 8, 2015



Thomas A. Connors
Justice of the Superior Court

A TRUE COPY
Attest: 
Deputy Assistant Clerk
7/10/15

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 11

(November 2014 Email from Town Counsel's Office to
Plaintiff's Counsel Regarding the State Ethics Law's
"Forever Ban," His Former Special Municipal Town
Employment, and His Current Representation of
Plaintiff)

Patty Correa

From: Patty Correa
Sent: Monday, November 10, 2014 3:30 PM
To: Brooks Ames (brooksames1@gmail.com)
Subject: FF Alston
Attachments: 2013-09-11 Minutes.pdf; 2013-09-24 HRYR Commission to Selectmen.docx

Hi Brooks – I just tried phoning you about your letter of today to Chairman of the Board of Selectmen Ken Goldstein and left you a message at the 617-274-5728 number on your letterhead. Your letter said that you represent FF Alston in "all matters relating to his employment" with the Town. I wanted to understand the parameters of your representation better, and perhaps to discuss with you whether you should seek an opinion from the Ethics Commission if appropriate, in light of what those parameters may be (maybe you have already?), before any meeting with Chairman Goldstein. Below is the language of the possibly relevant provision of G.L. c. 268A (what the Ethics Commission calls the "forever ban"), and I attach the 9/2013 HRYR commission minutes posted on-line, as well as a public records request from the Commission to the Town following that meeting.

Call me to discuss? Let's hold off on confirming a Wednesday meeting with Chairman Goldstein (I know you had suggested to Chairman Goldstein Wednesday afternoon) until we have a discussion.

Separate and apart from your request to meet with Chairman Goldstein, I understand that on Friday you left him a voice mail message saying that FF Alston would not attend the reasonable accommodation meeting scheduled for this morning, and that you would like to combine that meeting with the meeting with Chairman Goldstein. Chairman Goldstein did not receive it in time so that personnel could have been timely alerted. In the future, as he has been doing to date, FF Alston should communicate directly with his Chief if there are issues he has in following through on the Chief's requests (such as to attend the reasonable accommodation meeting this morning).

I am in until 5. Tomorrow, the Town is closed for Veteran's Day. Thank you.

Regards,

Patty

"Section 18. (a) A former municipal employee who knowingly acts as agent or attorney for ... anyone other than the same ... town in connection with any particular matter in which the ... town is a party or has a direct and substantial interest and in which he participated as a municipal employee while so employed ... (d) shall be punished by a fine of not more than \$10,000, or by imprisonment in the state prison for not more than 5 years, or in a jail or house of correction for not more than 2 ½ years, or both."

Patricia Correa
Associate Town Counsel
Town of Brookline
333 Washington St., 6th Floor
Brookline, MA 02445
Tel: (617) 730-2190
Fax: (617) 264-6463

1



TOWN OF BROOKLINE

DEPARTMENT OF PUBLIC HEALTH

11 Pierce Street, Brookline, Massachusetts, 02445
Telephone: (617) 730-2297 Facsimile: (617) 730-2296

Human Relations Youth Resources Commission

Diversity Sub-Commission Meeting

Date: 09/11/2013

Commission Members Present: Brooks Ames- Chair
Mariela Ames
Laurence Onie
Georgi Vogel Rosen

Public Present: Scott Murphy
Cornelia Van Der Zeil TMM-15
Arthur Conquest TMM-
Patricia Connors
Brian Hochlneuter
Regina Frawley

Staff: Lloyd Gellineau

The Chair called the meeting to order. Members were informed that the meeting was being recorded.

Chair provided an update regarding a racial discrimination case that has been filed against the town in Norfolk Superior Court by a Brookline firefighter. He mentioned that the case was reported in the Boston Globe and the Brookline TAB. Chairman Ames stated that the news articles were unclear on some of the detail of the case and that he received some additional insight regarding the case by reviewing court documents at the Norfolk County Court. He was able to determine that the firefighter's allegations included that another fire fighter uttered the phrase "***** n*****" when he left a voicemail on the complainant's voicemail. The chair also stated that the town's response to the allegation was vague, as it did not clearly state if the derogatory language was used. He mentioned what was clear was that the fire fighter who allegedly made the statement was suspended. The conclusion of the town investigation was that the racial slur was not directed at the fire fighter who made the complaint. There were other allegations submitted by the firefighter which included retaliatory behavior by other firefighters that was allegedly condoned and encouraged by superior officers. The chair raised the notion that being aware of these allegations and the processing of the complaint was within the scope of the Commission's charge. Efforts to get more information regarding what has been done by the town to address the allegations and to support the firefighter has not been successful. There was concern regarding the firefighter's safety with the fire department as well as his overall mental and physical health.

Mr. Onie stated the town claimed to have done training with the fire department. Ms. Ames stated that the training occurred close to when the complaint happened, about 2010.

2

Mr. Ames stated that when the news broke, he did not hear from any public official about what is being done now to address the situation. He proposed identifying ways to get involved in assisting the firefighter going forward, with a focus on what has been done regarding the allegation of ostracism and what has been done regarding what has to be a challenging racial environment in the fire houses. Mr. Onie remarked that the Town would say that it is now in Norfolk Superior Court- therefore we can't talk about it; it is in the hands of Town Counsel.

Mr. Ames stated that this is a public meeting and he will ask for input from the public after hearing the views of the Commission members. Ms. Ames suggested a meeting with the fire chief to collaborate with him on addressing the environment in the Fire Department. She had some ideas on how to go about it. She wanted to see the Chief's position on how willing he is to do it, rather than him finding out that we are moving forward with a plan. Mr. Onie suggested that we invite the Chief to a meeting. Ms. Ames said that her idea was to invite him.

Mr. Ames reported that he asked Lloyd to request a meeting with the BOS Chair or designee to appear at a Commission meeting to brief it on the Case. Lloyd informed the Committee that Town Counsel informed the BOS Chair not to appear because the case is in litigation. Mr. Ames commented that one of the things the Commission was told by the Town Administrator was that Lloyd would have direct access to the Selectman. He asked Lloyd does he have a direct line to the BoS. Lloyd informed the Committee that he has a direct line to the Town Administrator, but not to the BoS Chair- that has not been directly articulated. Mr. Conquest asked if it was in writing. Lloyd responded it was said in public, at one of these meetings.

Mr. Ames noted that there was a lack of clarity in what the Commission and the Commission's staff roles are in addressing this complaint. He stated that is quite clear in the by-law that the Commission is responsible for securing the investigation of complaints of discrimination. What wasn't clear is how to effect that in practice. It was also not clear what the appetite was for the Commission to be active in addressing acts of discrimination.

Ms. Ames wanted to address the reason why the Committee was not made aware of this particular complaint. She informed the Committee that she posted several questions on the Town Meeting Member list serve, directed to the Selectmen, regarding the firefighter case. She asked whendid the Selectmen become aware of this complaint, why wasn't the Commission informed of the complaint or any other complaint of discrimination. Another question posed was what had Human Resources, or the Town Administrator, Fire Chief, or the Selectmen themselves done to address the allegations of a hostile racial environment in the Fire Department. Mr. Onie clarified that Ms. Ames list-serve questions were submitted as her role as a TMM and not as a Commission member. Ms. Ames confirmed the clarification.

Mr. Ames suggested that these questions could be articulated on Committee stationery and then sent to the Selectmen. He stated that the response may be the same, but at least it would be known what the Commission thought were the important questions to address.

Mr. Ames also posed the possibility of hiring a consultant, as permitted by the by-law, to provide a fuller investigation to provide a neutral/independent assessment of Fire Department. The consultant would then report the findings to the Commission. Based on the report findings, the Commission could then make recommendations as to what steps might be taken to address any findings. The Chair shared that he had corresponded with Patricia Connors regarding the idea of having a consultant investigate a situation while it was in litigation, and it was noted that it does happen on occasion. Mr. Onie thought it to be a good idea and suggested contacting Nancy Gertner who lives in Town. He commented that she was a US district Judge and has a stellar reputation. She could possibly do it herself or know someone whom might. Mr. Ames stated that the Committee could talk about what the scope of the consultation should be.

Chair opens the floor for public interaction. He recognizes Mr. Hochleutner. Mr. Hochleutner noted that it will be difficult to get the town to talk to us or allow us to part of an investigation while it is facing potential liability. He thought it was a fair position on their part. He questioned why did it take so long, why did it go to have to go to litigation. Perhaps if the Town had the Commission's involvement prior to the current status of the case, the Commission may have help reduce the possibility of litigation. He wanted to explore ways on how to present the Commission to the Town as an avenue to prevent cases from escalating to the level as the case being reviewed this evening.

Ms. Ames agreed with Mr. Hochleutner, but also said that the Town has refused the Commission's involvement in reviewing the cases. She also commented that she understood the need for the Town to protect itself, but it has a responsibility to address the issue that created the problem from the start; addressing the concerns will only benefit the town by improving the environment.

The Chair recognizes Mr. Conquest. He expressed concern for the mental disposition of the Black Firefighter. He noted that he had seen what happens to individuals who have had encounters with the Town and the reaction of the Town to those individuals. He suggested that the Commission find some way to reach out the Fire Fighter and offer support.

The Chair asked Lloyd if there is any reason that he could not do outreach to the firefighter. Lloyd responded that he represented the Town. He stated that there has been some outreach to this person. He was not able to inform the Commission how long ago, but when he made an inquiry regarding it he was informed that it did occur in the past. He suggested that there needed to be more outreach. Whether the person accepts it or not Lloyd indicated he could not share that information. The chair asked whether we could not talk to the firefighter because the case is in litigation. Lloyd responded clinically there was no reason for him to not do that other than the fact that he represented the town, and he would have to share that with him. It would be a conflict for this fellow and he would have to let him know that and then would his lawyer let him talk to me. Lloyd said outreach was important.

The Chair asked because the Commission represents the town and at the same time is charged with advocating for people who have been discriminated against, does that mean the Commission has a conflict of interest. Lloyd stated that he did not see any issue with Commission members doing outreach to the firefighter. The question was raised to whether there would be a conflict if a town employee reached out to the Commission for support regarding a discriminatory practice would that be a conflict of interest. Lloyd responded that at that point no, once it reached litigation, town staff involvement it would be a conflict.

Ms. Ames raised a question regarding whether inviting minority fire department employees to a meeting would be permissible. Lloyd responded that he did not think that would violate anything. He stated that it would be appropriate to inform the fire department that the Commission would be doing and invite the heads as well.

Ms. Ames requested the location information for the Firefighter. Lloyd agreed to assist in finding this information.

Mr. Onie asked if it was fair to say this is a public health problem. He was concern about the impact of the fire station's environment on the physical and mental well being of the firefighter. Lloyd responded that racism and intolerance is a public health issue. Mr. Ames remarked that if it is a public health issue in Brookline, it is one in the Fire Department and most likely in other departments as well.

Mr. Ames delineated previously mentioned possible approaches to getting involved with the firefighter case:

1. Independent investigation- possibly expanding across the departments. What is the culture of the workplace in Brookline in regards to race?
2. Invite Town employees to a Commission meeting. Mr. Onie suggested bringing in the Dept. Heads to discuss the workplace as Public Health concern.

Ms. Connors agreed that a conversation was needed and she noted that a Racism Forum was scheduled for Oct 2nd through Brookline Adult Education. She also addressed that having Dr. Gellineau discuss specifics about this case may open the town to further liability. She raised that there may be employment repercussions for Dr. Gellineau. Ms. Ames and others commented that they were aware of Ms. Connor's concerns. There was further discussion about the role of Dr. Gellineau and his role as it related to working town employee discrimination cases.

There was discussion about whether to look at Racism as Public Health concern or should it be viewed independently when presenting it to Town employees and the general public. It was generally agreed upon that a Public Health perspective was appropriate.

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Mr. Ames wondered if having employees attend a meeting, from any Town department, would result in the Town becoming defensive due to the possibility of liability. There was continued discussion regarding the ramifications of having employees share their experiences in a public forum.

Mr. Onie emphasized that town employees, work for the people of the town. Mr. Conquest raised the concern that the decision makers are all white and they are the ones who are deciding whether racism exists in Brookline. Mr. Onie thought workers would feel safer if we invited those in top positions to talk with the Commission about racism and whether it is a public health issue in Brookline. Mr. Ames observed that we may be discouraging employees from expressing their experience because of the concerns that it would lead to law suits against the Town. Mr. Hochleutner stated that it wasn't that we are discouraging folks from sharing their experiences in a public forum, but he wanted the Commission to be aware of the possible ramifications for doing so.

There was discussion regarding survey questions to the employees and the fact that only four African-American employees responded to the survey.

Ms. Ames reiterated that the goal is to prevent situations from escalating to the point of litigation and that independent data will help with this as it cannot be ignored. She expressed her concerns about the poverty of information regarding what is happening in the fire station and what is and can be done about. She wanted to know if the fire chief had ideas to on how to address these concerns on his own. She would like to work in collaboration with the chief to address the workplace environment. A public member suggested meeting in an executive session might be amenable to Town Counsel. Another suggestion from the public would be to have a public forum. Mr. Ames and Mr. Onie did not think employees would come to such an event. Mr. Onie described it as a culture of fear that exists in the workforce. Mr. Ames stated that we have to find a way to break through it. He observed that we need to get past the legal road block that we keep facing.

Mr. Conquest observed that change has to start at the top. Mr. Ames agreed and noted that the larger Commission has only had one meeting with a quorum this year. He stressed that we needed to have a Commission to engage with the Town and the Selectmen.

Mr. Ames and Mr. Onie commented that the focus on meeting procedures and technicalities intentional interfered with the Commission work and it will ultimately hurt the town in the long run. There was general discussion regarding sanctions that were given in other town and cities to employees who have done similar acts of racial misconduct as alleged in the firefighter case. Mr. Onie stressed that the Selectmen's refusal to appoint members to the Commission is a disservice to the town.

There was more discussion regarding the allegations made by the firefighter.

Mr. Hochleutner reiterated that a letter be written to the Selectmen asking specifics about the case. Ms. Ames described a recent fire incident in her home in which she observed a black firefighter that had no interaction with other firefighters on the scene whom were white. It reinforced her thought that there is a racially toxic environment in the Fire Department that the Commission should be involved in correcting. Mr. Ames asked if there be any benefit to having the Selectmen give us a briefing on what is happening. Mr. Onie suggested that we bring in the Fire Chief in to have a candid conversation to address the work environment issue. Mr. Ames noted that this has been done with the Police Chief and other departments. It was noted that the idea for the meeting is look at preventive measures rather than the re- investigating a particular case.

Vote taking to invite the Fire Chief to attend a HRYR- Diversity Committee meeting to talk about Diversity.

Motion was unanimously passed.

Lloyd agreed to extend the invitation to the Chief Police.

Motion to draft and send a letter, from the Committee, to the Board of Selectmen regarding questions that pertained to the firefighter's complaint. It was agreed that the letter be drafted by Ms. Ames and Mr. Hochleutner.

5

Motion was unanimously passed

Regina Frawley suggested that the Town may be less defensive and more open to discussion if it felt that invitations to meet with the Commission were to be in the spirit of fact finding and not interrogations.

Meeting adjourned.

6

September 24, 2013

Board of Selectmen
Town of Brookline
333 Washington Street
Brookline, MA 02445
Attention: Betsy DeWitt, Chairman

Dear Chairman DeWitt,

We are writing to you as members of the Brookline Human Relations Commission, regarding the lawsuit that has been filed against the town by a black firefighter, Mr. Gerald Alston, alleging racial discrimination, as well as ostracism and retaliation within the Fire Department. We express no view on the ultimate merit of Mr. Alston's legal claims, but are compelled to write in our role as commissioners, as part of an effort to further improve human and racial relations in Brookline.

As an initial matter, we are disappointed that the Alston complaint was not brought to our attention earlier by representatives of town government; we first learned about Mr. Alston's claims and the town's response through coverage in the newspaper. There certainly has been more than ample time for someone involved in the complaint and its response to involve the Human Relations Commission: according to Mr. Alston's complaint, the initial incident took place in 2010 and there have been a variety of events since that time that he alleges are significant to his complaint. We understand that the handling of a complaint of this nature is a sensitive matter. But we believe that the Human Relations Commission has a role to play with respect to complaints of racial discrimination like those at issue here. The fact that our commission was not even aware of Mr. Alston's complaint as it unfolded over the past three years is troubling.

We want to be helpful with respect to these kinds of issues, and we believe that the Human Relations Commission should have a role in collecting and disseminating information, and discussing possible responses, when there has been a serious allegation of racial discrimination or retaliation by the Town of Brookline against a town employee. In fact, we believe that involving the Human Relations Commission in such matters could reduce the risk of litigation. For example, if we had been made aware of Mr. Alston's underlying complaint earlier, we may have been able to play a helpful role in gathering information, evaluating facts, and facilitating communication between different parties.

Now that litigation has been commenced, we understand that there are concerns about sharing information as to Mr. Alston's case. That said, we believe it is our duty to obtain further information regarding the underlying facts. Accordingly, we respectfully request that the following non-privileged information and materials be promptly provided to the Human Relations Commission:

- A copy of any documentation as to Mr. Alston's initial complaint or request for action respecting the 2010 incident, and any subsequent complaints or requests by Mr. Alston respecting his treatment thereafter.

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- A copy of any documentation of the investigation into Mr. Alston's complaint (which investigation is referenced in both Mr. Alston's complaint and the Town's answer).
- Any non-privileged documentation regarding Mr. Alston's allegations and how they were being addressed.
- Any documentation of complaints that there is a racially hostile work environment in the Brookline Fire Department.

As noted, we understand that the Town of Brookline is now a defendant in litigation brought by Mr. Alston, and we are sensitive to that. However, the town's bylaws state that the Human Relations Commission is to "initiate, receive, secure the investigation of and seek the satisfactory adjustment of complaints charging discrimination," and the requests above are made in furtherance of the Commission's duties under the bylaws.

We appreciate your cooperation in promptly responding to this request. We hope that by getting further information we will be able to think and speak intelligently about the issues raised by Mr. Alston complaint, and to work with the Board of Selectmen, the Fire Department, and others to discuss appropriate responses -- outside of the courtroom.

Please do not hesitate to contact any of us if you have questions.

Respectfully,

Members of the Brookline Human Relations Commission

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Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 12

(Town Psychiatrist's March 2015 Return to Work
Conditions)



MASSACHUSETTS
GENERAL HOSPITAL

One Bowdoin Square
15 New Chardon Street
10th Floor
Boston, MA 02114
Tel: 617-724-8658
Fax: 617-724-2808

Law & Psychiatry Service
Department of Psychiatry

Independent Psychiatric Exam

Name: Gerald Alston

Date of Birth: [REDACTED]

Referral Source: Town of Brookline Fire Department

Date of Evaluation: February 12, 2015

Date of Report: March 18, 2015 (Submitted March 19, 2015)

Evaluator: Marilyn Price, MD

IDENTIFYING INFORMATION AND REASON FOR REFERRAL:

Gerald Alston is a 46 year old firefighter with the Town of Brookline Fire Department. According to the information contained in a letter from the Town of Brookline Fire Department, dated 02/10/15:

Firefighter Alston reported that he found the word "Leave" written on the side of a fire apparatus. Firefighter Alston engaged in conduct following this discovery, which raised questions about safety. The Human Resource Department "performed two investigations: (1) violation of the Town's anti-discrimination policy (for the writing of the word leave), and (2) an investigation into whether Firefighter Alston violated the Town's workplace safety policy. To date, Firefighter Alston remains out of work as he has not been deemed fit for duty since his March 19, 2014 evaluation."

The Town of Brookline Fire Department has requested a psychiatric evaluation to assess whether Firefighter Alston is able to perform the essential functions of his job with or without



A Teaching Affiliate
of Harvard Medical School

A FOUNDING MEMBER OF **PARTNERS.**
HEALTHCARE

Gerald Alston

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[REDACTED]

[REDACTED] Therefore, in order for Firefighter Alston to return to work, there would need to be accommodations in place to mitigate risk.

Firefighter Alston does have several risk factors associated with an elevated risk of violence.

[REDACTED]

[REDACTED]

In my opinion Firefighter Alston would be able to return to work full time if a return plan can be arranged with sufficient accommodations to reduce his stress and if Firefighter Alston commits to appropriate treatment. I would recommend the following:

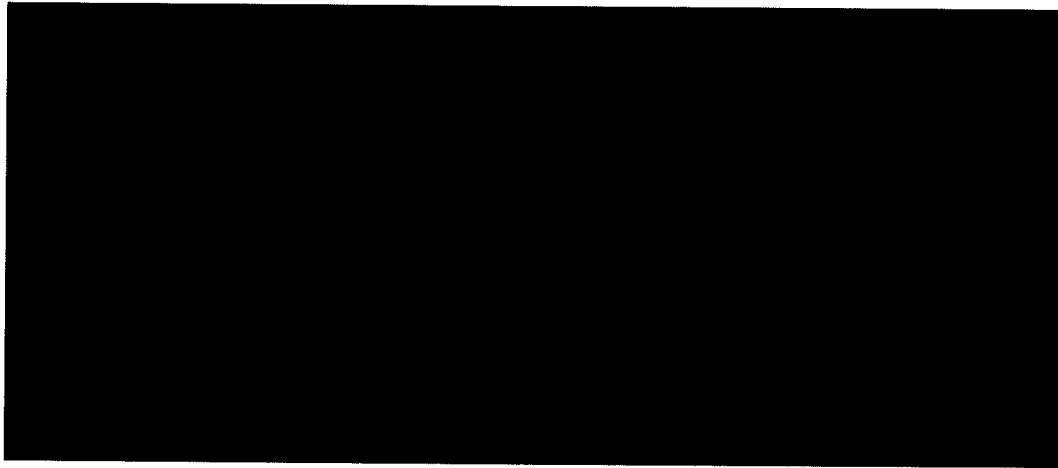
1. Treatment Recommendations:

Firefighter Alston should be in treatment with a psychiatrist and a therapist so that he would have appropriate treatment to help him to be better able to handle stressors he is likely to encounter upon returning to work. Firefighter Alston should be in treatment for at least a month prior to attempting a return to work so that he can develop a relationship with his treators.

Gerald Alston

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In my opinion Firefighter Alston's compliance with treatment should be monitored for a period of at least 1 year. He should be seen by a therapist at least weekly and by a psychiatrist at least monthly during the monitoring period. Appropriate releases of information forms should be signed so that Firefighter Alston's treators can report failure to comply with treatment or relate any concerns about safety to the Town's HR department or otherwise designated agent.

2. Recommendations for workplace accommodations:

During the interview, Firefighter Alston mentioned that there had been problems, especially when assigned to other fire stations. He was given the opportunity to recommend specific accommodations that would decrease the level of stress, such as avoiding contact with certain firefighters in addition to Captain Pender, or minimizing work at other stations or being assigned to work with a specific person whom he trusts. It would be helpful for Firefighter Alston to have a designated workplace monitor to whom he can bring concerns so that issues can be addressed.

Firefighter Alston has not cooperated with investigations regarding his allegations of continued discrimination. As a result he has not named those persons whom he believes have engaged in discriminatory conduct. If he had done so this would help in assigning him to a Station where he would be most likely to succeed.

It would be very difficult for Firefighter Alston, or any firefighter to work effectively and feel secure that he would be backed up in dangerous situations if he/she does not trust

This would indicated that Firefighter Alston had been dealing with his stress and depression by using cocaine and marijuana. The use

Gerald Alston

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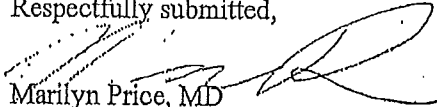
Page 50 of 50

of drugs would compromise his ability to perform the essential job functions and could increase the risk of further behavioral outbursts. As a result I have recommended random toxic screens (see above).

Please let me know if I can be of assistance in this matter.

Respectfully submitted,

Marilyn Price, MD

A handwritten signature in black ink, appearing to read 'Marilyn Price', is written over the printed name.

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 13

(Local 950 Official's September 2010 "Blog" Posting)

10/20/2010

Gmail - Keep this safe



Gerald Alston <gerald.alston@gmail.com>

Keep this safe

1 message

Gerald Alston <gerald.alston@gmail.com>

Sat, Sep 25, 2010 at 3:00 PM

To: sobeida.alston@gmail.com, "Stein, Sandra" <Sandra.Stein@childrens.harvard.edu>, Gail
<smkwifebry@verzion.net>, Gerald Alston Jr <gerald.alston@gmail.com>

General

Sep 23

FACELESS COWARD

by Joe Canney

To the faceless coward who for no good reason, except of course his own self intrest leaked to the media about one our BROTHER"S alleged acts of misconduct on what should have been the proudest day of their professional lives is _____, I honestly can't even find an appropriate word for it. I have been around this job a long time and seen and heard a lot, but this even exceeds my wildest expectations of someones having a personal agenda to destroy another. This union went through this type of personal, meritless attacks before and it almost destroyed us, don't let this ever happen again, for all our sakes!

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 14

(February 2013 Diversity Subcommittee Minutes
Regarding 2008 Police Candidate Complaint)

Human Relations-Youth Resources Commission

Diversity Sub-Committee

*****Brookline Health Building***
Denny Room
11 Pierce Street
Brookline, Massachusetts**

February 27, 2013

Minutes

Members Attending

**Brooks Ames, Chair
Georgi Vogel Rosen
Larry Onie**

Members Absent

**Rita McNally
Mariela Ames**

Staff Attending

C. Stephen Bressler, Director

Members of the Public Attending

**Arthur W. Conquest III
Frank Farlow
Kim Pitts
Tarquam Pitts
Cruz Sanabria**

Commission Member Attending

Brian Hochleutner

Chairman Ames opened the meeting at 6:39 p.m.

Mr. Ames noted that Mr. Bressler is audio recording the meeting to assist in preparing the minutes.

Approval of Minutes

ON THE MOTION of Ms. Vogel Rosen, seconded by Mr. Onie, the Sub-Committee voted unanimously to approve the minutes of the December 19, 2012, January 17, 2013, and January 31, 2013 meetings as written.

Meet With Kim Pitts

Brookline resident Ms. Kim Pitts appeared before the Sub-Committee. She is a 29 year resident of the town. Ms. Pitts is African-American. She went to the Pierce School and Brookline High School. Ms. Pitts currently works for the TSA at Logan Airport.

Minutes of February 27, 2013 Human Relations-Youth Resources Commission
Diversity Sub-Committee Meeting
Page Two

Ms. Pitts explained how in April 2008 she took the Civil Service examination for police officer in Brookline. She said that she scored 8 out of 10 on the exam. In addition to the civil service exam, Ms. Pitts was interviewed by a detective. Ms. Pitts also had a second interview. Ms. Pitts was not hired as a police officer in Brookline. She said that she never received any explanation (bypass letter) as to why she was not hired. Another woman from Brookline, an acquaintance of Ms. Pitts, was hired by the police department.

Ms. Pitts talked about what was covered in her interview with the police detective. She said that she did not believe there was anything in her CORI that would have disqualified her from getting the job with the Brookline Police.

Mr. Conquest asked her whether there was anything in her background that may have been problematical? Ms. Pitts answered that there was nothing. Chairman Ames asked whether there had ever been any convictions in court? Ms. Pitts said that there had been no convictions.

Mr. Sanabria asked whether Ms. Pitts is a veteran. She said she is not.

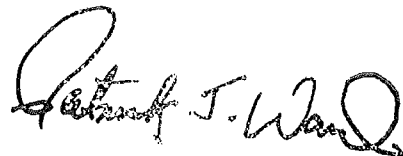
Ms. Pitts also said that she had indicated an interest in DPW positions in the town, but that she was not contacted to interview for, or was hired for, any of those positions.

Mr. Onie asked Ms. Pitts whether at the time she was aware of the existence of the Human Relations-Youth Resources Commission and that she could have filed a complaint with the Commission? She said she was not.

Ms. Pitts said that she is going to take the Police Civil Service Examination again in April.

The meeting adjourned at 6:58 p.m.

A TRUE COPY
ATTEST:



Town Clerk
Brookline

Defendant Town's Memorandum in Support of
Partial Motion to Dismiss

EXHIBIT 15

(Attorney Brooks Ames's Re-"Tweet" of Cartoon
Depicting Plaintiff's Rendition of January 2015 Meeting
with Board of Selectmen Chair)

 Car Williams @cantorwilliams · Jan 16
[@aaronmartel](#) [@BLM_Boston](#) good lord.

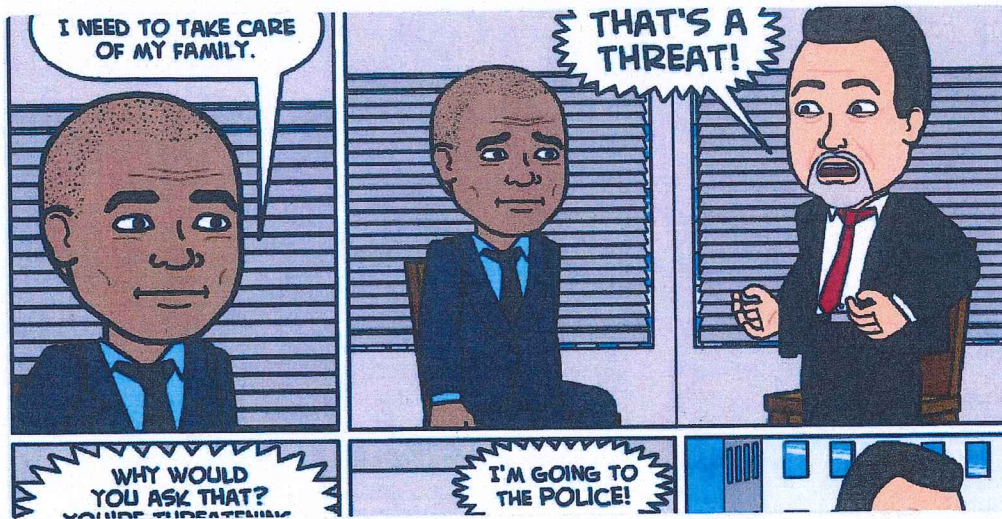
1

[View conversation](#)

 Brooks Ames retweeted

 Aarón Martel [@aaronmartel](#) · Jan 18

[#Brookline](#)'s top official *ran* out of Town Hall in fear b/c a Black person asked "do you have a family?" [@BLM_Boston](#)



5

1

[View more photos and videos](#)

 Brooks Ames [@BrooksAmes1](#) · Jan 18

"De facto segregation in the North is as evil as open segregation in the South ...The tactics may differ but the intent is the same." -MLK

3

2

 Brooks Ames [@BrooksAmes1](#) · Jan 18

[@danteramos](#) [@JamieEldridgeMA](#) Here's link--7 not 8 is up to date.
[profiles.doe.mass.edu/profiles/stude...](#)



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**Aarón Martel**

@aaronmartel

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#Brookline's top official *ran* out of Town Hall in fear b/c a Black person asked "do you have a family?" @BLM_Boston



RETWEETS

5

FAVORITE

1

